73-6877

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6877

HENRY N. JARRETTE,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

JAMES E. GRIFFIN
CHARLES D. HUMPHRIES
310 N. Church Street
Monroe, North Carolina 28110

ADAM STEIN
Chambers, Stein, Ferguson & Lanning
157 East Rosemary Street
Chapel Hill, North Carolina 27514

JACK GREENBERG
JAMES M. NABRIT, III
PEGGY C. DAVIS
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

JACK HIMMELSTEIN
435 West 116th Street
New York, New York 10027

ATTORNEYS FOR PETITIONER

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petition prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on February 25, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 284 N.C. 625, 202 S.E.2d 721 (1974) and is set out in Appendix A hereto, pp. 1a-31a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on February 25, 1974 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder and for the crime of rape under

the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of six veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

3. Whether petitioner's unsigned statement, taken and transcribed by a police officer while petitioner was in custody, should have been excluded under Miranda v. Arizona, 384 U.S. 436 (1966), when petitioner stated that he would not sign the statement until he had seen a lawyer and that he knew a lawyer would be appointed for him at trial?

4. Whether petitioner's right to a fair trial by an impartial jury guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States was denied by the trial court's refusal to grant his change of venue motion, made on grounds of prejudicial pre-trial publicity?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premediated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the

State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State prison. 1/

§ 14-21. Punishment for rape.--Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. 2/

§ 15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by administration of lethal gas substituted therefor.

§ 15-188. Manner and place of execution.- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on February 25, 1974, affirming four criminal convictions and

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1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

2/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

sentences, including two death sentences, handed down in a single trial. Petitioner Henry N. Jarrette, a black man, was convicted on June 21, 1973, in the Union County Superior Court of North Carolina, of the armed robbery and first degree murder of Mr. David Timothy Parker and the kidnapping and rape of Miss Gwendolyn Blackmon. He received death sentences for the murder and for the rape,[3/] and a life sentence for the kidnapping. Sentence was not imposed for the armed robbery.

On February 9, 1973, petitioner was serving a 23-28 year sentence at North Carolina's Odom Prison pursuant to a conviction on two counts of murder.[4/] He had been elected president of the prison's Junior Chamber of Commerce unit, and had been given permission to attend a state-wide meeting of this organization in Raleigh, where he eluded the guard who was accompanying him and escaped from custody.

At petitioner's trial, Miss Gwendolyn Blackmon testified that at 3:30 p.m. on February 11, 1973, as she was getting ready to leave her 1964 Malibu Chevrolet in the parking lot of the Charlotte Public Library, petitioner, whom she had never seen before, accosted her and told her he would kill her if she didn't cooperate. Miss Blackmon was at that time sixteen years of age. Brandishing a "scout knife," R. 147, petitioner forced her back into the car, tied her hands with a necktie, and compelled her to

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3/ Petitioner's sentences of death were imposed under N.C. Gen.Stat. §§14-17, 14-21, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974) on April 8, 1974 which imposes the death penalty for first degree murder and for certain kinds of rape, but this statute was enacted subsequent to the decision of the North Carolina Supreme Court in petitioner's case and provides that it is applicable to offenses committed after its ratification.

4/ This fact was not disclosed by the evidence presented in the presence of the jury.

lie prone on the front seat. He drove to a country road where he stopped the car, telling her he was a "sex maniac." Ibid. Petitioner took off her clothes, ordered her into the back seat of the car, and then, by Miss Blackmon's testimony, "[w]e had sex, and after that, he turned me over and he had sex with my rectum." R. 148. During this time, petitioner's open knife rested on the front seat arm rest on the driver's side.

Miss Blackmon was then allowed to put her clothes on; petitioner once more tied her hands behind her back, and told her that if he could find another car, he would free her. They drove together and, as it began to get dark, they came to a "washerette," R. 149, in Waxhaw, North Carolina which had a yellow 1971 Grand Prix Pontiac with a cream vinyl top parked in front of it. Petitioner "said that he would get that one," R. 149, drove around the block once, and parked near the passenger side of the Pontiac. Taking the keys to Miss Blackmon's Malibu with him, petitioner went over to the Pontiac and talked briefly to its lone occupant, sixteen year old David Timothy Parker, through the open window of the car. Miss Blackmon testified that suddenly petitioner reached through the open window and stabbed the occupant of the Grand Prix twice in the chest with the knife he was carrying. She stated that the boy attempted to get out of the car but failed, and that petitioner then got into the driver's seat and drove the car "around the building." R. 152. In "two or three minutes," ibid., petitioner returned, untied her, gave her her keys back and "told me that he was sorry that he did it to me and that I would be a fool if I didn't report it." R. 150. Petitioner then walked back around the side of the building, and Miss Blackmon immediately drove away, reporting these incidents to her parents and to the police. On February 13, 1973, two agents of the North Carolina State Bureau of Investigation showed Miss Blackmon, who was accompanied by her mother, a set of five photographs (which were

introduced into evidence) containing one picture of petitioner. Miss Blackmon picked out petitioner's photo as the picture of the man who attacked her.

Further testimony indicated that the body of David Timothy Parker was discovered on February 13, 1973, in a ditch near a country road 5.4 miles from the town of Waxhaw. A forensic pathologist who performed an autopsy testified that the cause of death was a stab wound in the heart. Mr. Parker's brother testified that he had loaned Mr. Parker his yellow 1971 Grand Prix Pontiac at about 5:00 p.m., February 11, 1973 to go to the Waxhaw launderette.

A Charlotte policeman, E. A. Griffin, testified that at about 9:00 p.m. that same evening, he and a fellow patrolman had seen a 1971 Grand Prix with the same license plate number as that of the missing Parker car stopped near a phone booth. The officers turned on their siren and flasher light, but the car refused to stop. After a high speed chase, the police car rammed the Grand Prix, eventually causing it to stop. Its occupant, a lone black male whom Officer Griffin had never seen before, fled on foot and successfully eluded the officers, although he dropped his coat containing the name tag "Henry Jarrette Jackson" in a left front pocket.

Miss Blackmon identified the coat as having been worn by her attacker. R. 155. Officer Griffin, who testified that he was ten feet from the fleeing suspect at one point, made a courtroom identification of petitioner as the man he chased. A "hunting knife" found by police in the glove compartment of the abandoned Grand Prix, R. 172, was exhibited to Miss Blackmon on February 13, 1974 along with three other knives; and she selected it as the knife which her attacker carried. R. 153-154.

F.B.I. Special Agent Ivey Phelps testified that at 3:25 p.m. on February 15, 1973, he and a partner, Special Agent Thomas

Cooper, arrested petitioner in an apartment at 1130 University Street in Memphis, Tennessee pursuant to an "unlawful flight warrant." R. 180. This warrant had been issued in Charlotte, and the Memphis agents had received a description of it and a physical description of petitioner over the teletype in a communication from the Charlotte FBI Office that morning. The Memphis agents had been directed by this communication to proceed to 1130 University Street, the address of a former friend of petitioner's. The agents were admitted to the apartment by one Mrs. Hill, who stated that her daughter had once known Henry Jarrette when he was stationed at a naval air station some years before. In the back of the living room, the agents saw petitioner, who matched the physical description of the man for whom they were looking and who identified himself as "Ronald Harold." He told the agents that he lived on the "north side" of Memphis, R. 181, but the street he named was known by the agents to be on the south side of the city. As the agents continued to talk to Mrs. Hill, petitioner began edging out of the room. Agent Phelps testified that Mrs. Hill became "very nervous . . . and . . . nodd[ed] her head towards us." R. 181. The agent then placed petitioner under arrest for unlawful flight and he admitted that he was Henry Jarrette. The agents searched petitioner and found "a kitchen knife which had approximately a 6 inch serrated blade and a wooden handle" R. 183, and two newspaper clippings (which were never introduced into evidence) concerning the escape and crimes of Henry Jarrette.

Agent Phelps testified that petitioner was advised of his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966), in Mrs. Hill's apartment, and that he was then taken to the FBI building in Memphis where he was again advised of his constitutional rights at approximately 4:25 p.m. At this time, petitioner signed a waiver form to the effect that he had been

advised of his Miranda rights and did not wish to have a lawyer with him during interrogation. Special Agent Cooper testified that petitioner then made an oral statement which Special Agent Phelps transcribed in four handwritten pages. Petitioner did not sign this February 15 memorandum. Special Agent Cooper testified to the jury that petitioner orally confessed that he had walked away from his guard in Raleigh on February 9, that he abducted and had had sexual relations with Gwendolyn Blackmon on February 11 (petitioner denied, however, that he had forced or coerced Miss Blackmon to submit to him sexually), that he had stabbed "a young white male in a car in a parking lot of a laundrymat," R. 201, that he had thrown the body of this person into a ditch, that he had been chased by police officers in Charlotte, in a police car and on foot, but had evaded them, and that he had come to Memphis, where the FBI had arrested him.

Special Agent Cooper testified that he and Special Agent Phelps again interviewed petitioner at 9:15 a.m., February 16, 1973, and that after he had been given his Miranda rights and had signed a waiver, petitioner signed a five page statement (which Agent Phelps had written by hand) confessing to the same actions he had described in his oral statement the day before. Petitioner also stated that after eluding the Charlotte police on the night of February 11, he had hitchhiked to Mockville, North Carolina, where he had stolen a car and driven to Knoxville, Tennessee. From there, he took a bus to Memphis.

Special Agent Cooper also related that before petitioner signed the written statement on February 16, he made an oral statement, which was not integrated into the written confession. Petitioner said that while Mr. Parker's body was in the front seat of the Grand Prix, the car had become stuck in a snow bank, and that a car containing a man, woman, and children had stopped. The man helped petitioner pull his car out of the ditch; and

petitioner stated to the FBI agents that if the man had "seen what was inside [petitioner's] car, then he would have had to kill the man and his family."[5/] R. 218. Agent Cooper also testified that petitioner had remarked to him on February 15, 1973, outside the presence of Agent Phelps, that "he felt no guilt at the murder of the young boy in Waxhaw, and that if he had the opportunity, he would kill me." R. 219.

Union County Sheriff Frank Fowler testified that he flew to Memphis to take petitioner back to North Carolina on February 23, 1973, after petitioner had waived extradition. He testified that in the presence of Deputy Sheriff McGuirt he gave petitioner a Miranda warning that evening at 7:07 p.m. in the conference room of the Union County Jail; that petitioner signed a waiver form; and that petitioner subsequently made an oral statement which Sheriff Fowler transcribed in four pages in his own handwriting. When asked whether he wanted a lawyer, petitioner replied, in Sheriff Fowler's words, "that he knew the court would appoint him a lawyer when he came to court." R. 233. Sheriff Fowler testified that he made no other statement concerning wanting a lawyer than this. R. 233. This confession admitted that petitioner escaped from Odom Prison, abducted a "small black girl" and told her to "shut up or I would hurt her," R. 237, drove into the country where he "had sexual relations" with her, ibid., stabbed to death a "white boy" in Waxhaw, ibid., was

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5/ The State presented a witness, one Troy Trull, who testified that between 6:00 p.m. and 8:00 p.m. on February 11, 1973, he, his wife, and their three children had viewed a car stuck in the snow about five miles outside Waxhaw. He testified that a lone black male was in the car, that he did not look into the front seat of the car, and that he helped pull this car out of the snow. This witness could not identify petitioner as the man he assisted on the evening of February 11, but he added that "The man that I helped used no threats or violence or anything. He struck me as being the opposite." R. 221.

helped out of a ditch by a man and his family (petitioner said he did not "know what I might have done to them if they had seen the body," R. 238), dumped the body in a ditch, and ultimately made his way to Memphis. Petitioner refused to sign this statement, however, saying, again in Sheriff Fowler's words, that "he wouldn't sign it until after the court appointed him a lawyer and he talked to him." R. 232.

During the selection of the jury at petitioner's trial, six of the veniremen examined on voir dire were excused by the trial court for cause upon motion of the State because they expressed conscientious scruples concerning the imposition of the death penalty.[6/] Petitioner made a motion for removal of the case to another court for trial and, in the alternative, for a special venire on the grounds that there had been extensive prejudicial publicity in Union County concerning petitioner's escape from prison, the formal declaration that he was an "outlaw,"[7/] and the crimes for which he was previously convicted. Petitioner submitted testimony and newspaper clippings in support of his claim. The trial court denied the motion. R.39-41.

6/ The voir dire examinations of the jurors excused on this ground appear in the following pages of the Record:
Mrs. George Ray McWhorter -- R. 53-56, 67
Mr. Dallas Baucom -- R. 57-58, 64
Mr. J. Lee Haigler -- R. 59-60. 64
Mrs. Hazel Purser -- R. 65-66
Mr. Walter Mosley, Jr. -- R. 111-114
During the selection of the two alternate jurors, one venireman, a Mr. James Franklin Cox, was excluded for cause on account of his conscientious scruples against the death penalty. The record of this voir dire was not included in the narrative "Statement of Case Upon Appeal," but appears in the transcript of proceedings, State v. Jarrette, Union County Superior Ct. No. 73-1342, 72-1339, 73-2843, 73-1341, Vol. II at 253-256 (June 19, 1973). The Court is familiar with the North Carolina practice of narrating the transcript on appeal. See Bumper v. North Carolina, 391 U.S. 543, 546 n. 8 (1968).

7/ This Outlawry Proclamation is attached to this petition as Appendix B. One of the veniremen stated that he had read that petitioner "had been declared an outlaw." R. 80.

Sheriff Fowler's four-page transcription of petitioner's February 23 confession was read to the jury over objection. R. 236-239.

After a jury verdict of guilty upon all four counts, the trial court pronounced sentences of death for first degree murder and for rape, and a sentence of life imprisonment for kidnapping.

On February 25, 1974, the Supreme Court of North Carolina affirmed petitioner's convictions and sentences, with three Justices dissenting in regard to the death penalty. On March 4, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court. On May 23, 1974, Mr. Chief Justice Burger granted petitioner an extension of time until June 25, 1974, in which to file a petition for certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Grouping of Exceptions and Assignments of Error (R. 299-322) assigned as error the death sentence imposed on petitioner:

> "The court erred in imposing the death penalty as judgments in the first degree murder verdict and the rape verdict."

Assignment of Error 126, R. 322. In his brief in the Supreme Court of North Carolina, petitioner argued that Furman v. Georgia, 408 U.S. 238 (1972) "invalidated . . . death sentences imposed pursuant to [N.C. Gen. Stat. §§14-17, 14-21] . . . leaving life imprisonment as the only possible punishment." Appellant's Brief at 66. The Court rejected this contention, holding that:

> "the meaning of G.S. §14-17, G.S. §14-21, G.S. §14-52, and G.S. §14-58 in the light of the decision of the Supreme Court of the United States in Furman v. Georgia . . . is that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the

> trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment."

202 S.E.2d at 740 (App. A at 20a).

II. Petitioner objected to the exclusion for cause of five veniremen on the grounds of their conscientious scruples against the death penalty, R. 67, 64-65, 66, 114, and excepted to the challenge of each of these veniremen. Exceptions 19 (an exception to the exclusion of two veniremen), 21, 24, 51. In his brief in the North Carolina Supreme Court, petitioner argued that these exceptions "violate the spirit of WITHERSPOON [Witherspoon v. Illinois, 391 U.S. 510 (1968)]." Appellant's Brief at 47. The Court rejected these contentions: "The sustaining of challenges for cause to these five prospective jurors, in view of their responses on voir dire, was not a violation of either the letter or the spirit of Witherspoon v. Illinois." 202 S.E.2d at 731 (App. A at 11a).

III. Petitioner objected to the reading to the jury of his unsigned confession to Sheriff Fowler, R. 236, 239, and moved to strike Sheriff Fowler's testimony concerning the confession. R. 239. Petitioner excepted to the denial of this motion (Exception 104, R. 239) and assigned this ruling as error:

> "The court erred in allowing Sheriff Fowler to read in the presence of the jury the alleged confession of the defendant when the same was never offered or admitted into evidence over defendant's objection and motion to strike the same."

Assignment of Error 104, R. 314-315. Petitioner's objection to the admission of the confession, referred to in Assignment of Error 104, was that the trial court had erred in finding the confession "voluntary and in waiver of the defendant's constitutional rights." Assignment of Error 103 (this particular Assignment of Error was abandoned in petitioner's brief, Appellant's Brief at 57, except insofar as it was preserved by incorporation into

Assignment of Error 104.) Petitioner's objection to the admission of his unsigned confession to Sheriff Fowler was preserved by argument in his brief. Appellant's Brief at 57. The Court rejected this contention:

> "Sheriff Fowler testified that after he returned the defendant to Union County, he also warned the defendant of his constitutuional rights, in compliance with Miranda v. Arizona, supra, and the defendant signed another written waiver thereof, including his right to have counsel present at the interrogation. Thereafter, the defendant made an oral statement in which the Sheriff reduced to writing but the defendant did not sign. Upon objection being interposed, the court conducted another full voir dire examination and thereafter made full findings of fact, fully supported by the evidence on the voir dire examination, to the effect that such statement was made voluntarily and intelligently, after the giving of the requisite warning concerning his constitutional rights. The court then overruled the objection to the testimony of the Sheriff concerning such statement. . . . [T]he defendant's concern was directed to whether the statement was voluntary and made with knowledge of the defendant's constitutional rights. . . . [T]his assignment of error . . . is without merit."

202 S.E.2d at 736-737 (App. A at 16a-17a).

IV. Before trial, petitioner moved for removal of the case to some other county for trial, alleging:

> "That he believes that it is impossible for him to obtain a fair and impartial trial in Union County by a jury composed of Union County residents." R. 16.

He also alleged that "wide-spread publicity has aroused and inflamed the passions of the citizens of Union County, making it impossible for the defendant to receive a fair and impartial trial in Union County by [a] jury composed of Union County residents." R. 16. After an evidentiary hearing, this motion was denied, R. 40. Petitioner excepted and assigned this ruling as error, Assignment of Error 2, R. 299, preserving this contention by argument in his brief. Brief of Appellant at 41-43. The Supreme Court of North Carolina rejected this claim. 202 S.E.2d at 729 (App. A at 9a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIMES OF MURDER AND RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73- (O.T. 1973, filed June 11, 1974), at pp. 11-51 and of the Petition for Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73- (O.T. 1973, filed June 11, 1974), at pp. 19-22 and each of the issues set forth there:

(A) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, 408 U.S. 238 (1972), is an impermissible evasion of the Furman holding;

(B) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishments;

(C) Whether the perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments;

(E) Whether the death penalty is an excessive, disproportionate, and aberrational punishment for the crime of rape when that crime results in no considerable bodily injury.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF SIX VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The record below presents important issues concerning the constitutionality of excluding persons who oppose capital punishment from service on trial juries in capital cases tried under a purportedly "mandatory" death-sentencing procedure. The Supreme Court of North Carolina held that exclusion for cause of six veniremen here was "not a violation of either the letter or the spirit of Witherspoon v. Illinois [391 U.S. 510 (1968)]," 202 S.E.2d at 731 (App.A at 11a), and that death qualification of the jury was permissible in a case where State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), ostensibly withdrew any sentencing function from the jury. That holding presents issues of general significance, which should be determined by this Court.

A. The Test of Exclusion Applied by the Court Below Did Not Meet the Minimum Standards Required by the Constitution As Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

Two principle questions concerning the applicability of Witherspoon are presented by this case, for that decision held that "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that outlined in Witherspoon] . . .. the death sentence

cannot be carried out." 391 U.S. at 522 n. 21 (emphasis added). See also Maxwell v. Bishop, 398 U.S. 262, 266 (1969); Boulden v. Holman, 394 U.S. 478, 482 (1968).

First, this Court should determine whether scruples against the imposition of capital punishment in all circumstances can be made "unmistakably clear", as required by Witherspoon, 391 U.S. at 522, n. 21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror if he possibly can. As the Court declared in Boulden v. Holman, 394 U.S. 478, 483-484 (1969): "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A venireman must be instructed that the law requires him to "subordinate his personal views to what he . . . .[perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, at 514-515 n. 7. Although a number of the excluded veniremen here stated that they would "automatically" vote against a verdict which entailed the imposition of a death sentence, none of them was given any instruction on their duty to subordinate their beliefs to the law of North Carolina that would be given them by the trial court.

Second, it is important for this Court to consider whether there are constitutional limits to death qualification when a venireman expresses honest doubts about whether he could return a verdict resulting in the imposition of the death penalty. Several veniremen here who expressed such doubts were strongly pressed to give a "yes or no" answer to the question whether they could return a capital verdict. The kind of brow-beating which finally results in a venireman's statement that he would "automatically" reject a capital verdict is at the heart of what Witherspoon condemns. For while a venireman should be questioned sufficiently to insure that his scruples are accurately expressed, he should not be pressured into the premature resolution of a difficult issue as to which he feels great uncertainty. 8/

8/ To illustrate this phenomenon, it is necessary to quote the voir dire record at some length:

> Q. (by the Solicitor)
> Going back to Mrs. McWhorter, I would ask you do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?
> A. I don't believe in capital punishment.
> Q. Then your answer to the question would be, "yes," that you do have such moral and religious scruples?
> A. Yes, sir . . . .
> Q. I'll ask that question again. On account of your moral or religious scruple, or scruples, would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree, or rape, knowing at the time that the defendant in that event would be sentenced to death?
> A. Well --
> Q. Do you understand the question?
> A. Yes, I do, and I just don't feel like that I could, because for someone's life to be taken away from them.
> Q. Before I ask any additional question I believe

B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to A Representative Jury.

Witherspoon was decided only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); and the cases in which this Court has since applied Witherspoon have all been pre-Duncan cases (see DeStefano v. Woods, 392 U.S. 631 (1968))

8/ cont'd.

his Honor will charge each and everyone of the jurors who will ultimately render a verdict in this case, and cases, that under the law of this state you are not to consider what the punishment in the case will be, that is not for you to say or determine . . . . With that in mind I ask you again, on account of your moral or religious scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree, or rape, knowing at the time that the defendants would be sentenced to death?
A. Well, I still say that I --
COURT: Say "yes" or "no."
A. No, I don't feel like --
Q. Then you are saying that it would be impossible for you to do that?
A. Yes, sir.
Q. Listen to this question, if you will, please. Will you automatically vote against a verdict of murder in the first degree without regard to any evidence that might develop at this trial?
A. No., I wouldn't vote against anything that was true, but I'd still don't believe in capital punishment . . . .
Q. . . . Maybe I can rephrase it. If his Honor charges you that in considering the possible verdicts in this case, one of the cases, particularly the case of murder in the first degree, that is the crime alleged, in determining whether or not the defendant is guilty of that offense, can you put aside any feeling that you have about capital punishment or the imposition of the death penalty?
A. Yes, sir.
Q. I'll ask the question in a different manner. If the State shows to you beyond any reasonable doubt, beyond a reasonable doubt, that the defendant is guilty of murder in the first degree, and rape, one or both, in that event will you return a verdict of guilty in the respective case without considering what the punishment in the case would be?
A. Yes.

or cases in which no Sixth Amendment contention was made against death qualification. See Boulden v. Holman, 394 U.S. 478 (1968); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971).

8/ cont'd.

> Q. You could put out of your mind your feelings about capital punishment?
> A. yes, sir.
> Q. You're positive of that?
> A. I think I could.
> Q. Well, if his Honor so instructed you, you would go by his Honor's instructions, would you?
> A. Yes, sir.
>
> . . .
> Q. Mrs. McWhorter, . . . In view of all of what you have heard since I last asked you questions, do you feel you could listen to the evidence in this case and the law as his Honor gives the law to you and after so doing if you found from the evidence and beyond a reasonable doubt that the defendant is guilty of murder in the first degree, would you vote to return that verdict?
> A. Well, I'd like --
> Q. Can you answer the question or not?
> A. I'd say "no." . . .
>
> A. I have studied over it since you have been talking to me and I just don't feel --
> Q. You feel if you knew the result would be --
> A. Death.
> Q. -- the imposition of the death penalty if you returned such a verdict, you couldn't consider that verdict without thinking about what the punishment would be, is that correct?
> A. I feel that way.

R. 53-55, 67. For another example of a juror who was in honest doubt about whether he could return a capital verdict and who was finally pressured into saying "no," see R. 111-114.

At the time Witherspoon was tried, the right to jury trial was governed only by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had recognized the rights of racial minority defendants to a jury from which members of their minority group were not excluded, see Smith v. Texas, 311 U.S. 128 (1940); Hernandez v. Texas, 347 U.S. 475 (1954), but it had not yet pronounced a general right to have a criminal jury selected from a panel representative of the populace.

The Sixth Amendment, however, entitles a defendant to this kind of jury. In Carter v. Greene County Jury Comm'n., 396 U.S. 320, 330 (1970), the Court held that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S.at 332 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)).

As the Court has clarified the nature of the "jury" guaranteed in state-court proceedings by the Sixth Amendment, the importance of the cross-section requirement has become increasingly highlighted, and the permissibility of death qualification has become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970) held that a jury of twelve was not an essential part of the Sixth Amendment right, since the key function of the jury was to provide a group representative of the community which would prevent Government oppression of

criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S. at 100. The Sixth Amendment required only that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . ." 9/ Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require state juries to reach a unanimous verdict, because the jury's commonsense judgment could still be rendered without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to cases involving race: see White v. Crook, 251 F. Supp. 401, 408-409 (MD. Ala. 1966)(exclusion of women); Labat v. Bennett, 365 F. 2d 698 (CA5 1966), cert.denied,386 U.S. 991 (1967)(exclusion of wage earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475

9/ The Court remarked the fact that in capital cases, no State provided for less than twelve jurors; it concluded that in death cases, this fact "suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103.

(1965)(exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Apodaca v. Oregon, supra, at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," and all such groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined."

The Court also recognized in Witherspoon that jurors with scruples against the imposition of the death penalty form a coherent and sizeable group in most communities from which juries are selected. It is unclear how large this class is, but it is clearly quite substantial. In Witherspoon, the Court took judicial notice of a 1967 poll in the International Review on Public Opinion[10/] and concluded that "less than half" of the people in the United States "believe in the death penalty." 391 U.S. at 520. A 1969 Gallup poll showed that 40% of those interviewed said they opposed imposition of the death penalty.[11/]

10/ Polls, International Review on Public Opinion, Vol. II, No. 3, at 84 (1967).

11/ Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen," 42 U. COL. L. REV. 1, fn. 2 (1970).

Since all jurors resolutely opposed to the death penalty were systematically excluded from petitioner's post-Duncan jury panel, the issue is presented here whether this wholesale, categorical exclusion of a sizeable portion of potential jurors may be justified under the exacting standards of the Sixth Amendment as incorporated into the Fourteenth by Duncan. Admittedly, a defendant may not object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit because of the danger that such veniremen, if selected as jurors, would bring to bear on the jury's deliberations attitudes inconsistent with their proper duty as jurors to determine the truth impartially. It is the rightful duty of the jury, however, to express community attitudes about punishment: "one of the most important functions any jury can perform . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n. 15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Supreme Court of North Carolina has apparently recognized this function even under the purportedly "mandatory" capital trial procedures instituted by State v. Waddell: no other explanation

is possible for its decision in State v. Britt, N. C. Sup. Ct. No. 36 (Robeson) (May 15, 1974) [12] that capital jurors should be informed that the wages of their verdict may be death, although no argument may be made to them concerning the propriety of the death penalty in the case before them. The Court should determine, therefore, whether a criminal defendant is entitled to a jury panel which reflects a fair cross section of community sentiment about the death penalty - a panel from which veniremen such as Dallas Baucom and James Franklin Cox cannot be excluded for cause. [13]

12/ This opinion is attached as Appendix D to Dillard v. North Carolina, No. 73- (O.T. 1973).

13/ These veniremen were excluded after the following exchanges:

> Q. Mr. Dallas Baucom, do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?
> A. Yes, sir,I do, I don't believe in it.
> Q. You are certain of it?
> A. I am certain.
> Q. On account of that moral or religious scruple, or scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree and rape knowing at the time that the defendant would be sentenced to death?
> A. Yes, sir I couldn't do it.
> Q. And I take it you would automatically vote against a verdict of guilty of rape without regard to any evidence that might develop at the trial?
> A. I'll put it this way, I don't believe in killing.
> Q. Does that mean you would automatically vote against a verdict --
> A. Well, if all said, "Kill him," I would have to vote against it, yes, sir.
> Q. Then I take it that in making up your verdict you could not put aside your knowledge of what the punishment in the case would be?
> A. Yes, I couldn't put a fellow to death.
> Q. If you were chosen to sit on this jury, are you saying that you would not under any

13/ cont'd.

circumstances give any consideration to returning a verdict which would involve the death penalty?
A. No, sir.
Q. That is what you are saying?
A. That is what I am saying, I couldn't do it.

R. 57-58.

CLERK OF SUPERIOR COURT: James Franklin Cox. Do you swear that you will true answers make to the court or anyone under its direction, touching your fitness and competency to serve as a juror, so help you God?
MR. COX: Yes . . . .

Q. Do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?
A. I do.
Q. How long have you held that view, Mr. Cox?
A. I guess all my life, adult life.
Q. On account of your beliefs, would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree or rape knowing that at that time the defendant would be sentenced to death?
A. It would.
Q. Then you would automatically vote against a verdict of murder in the first degree or rape without regard to any evidence that might develop at the trial?
A. I'm afraid I would have to.
Q. Are you saying if you were chosen to sit on this jury you would not under any circumstances give any consideration to returning a verdict which would involve the death penalty?
A. I wouldn't.
Q. Is that what you are saying?
A. Yes.

State v. Jarrette, Union County Superior Ct., No. 73-1342, 72-1339, 73-2043, 73-1341, Vol. II at 253-256 (June 19, 1973). See note 6, supra.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S UNSIGNED STATEMENT, TAKEN AND TRANSCRIBED BY A POLICE OFFICER WHILE PETITIONER WAS IN CUSTODY, SHOULD HAVE BEEN EXCLUDED UNDER MIRANDA V. ARIZONA, 384 U.S. 436 (1966), WHEN PETITIONER STATED THAT HE WOULD NOT SIGN THE STATEMENT UNTIL HE HAD SEEN A LAWYER AND THAT HE KNEW A LAWYER WOULD BE APPOINTED FOR HIM AT TRIAL?

This case presents a significant question concerning waiver of a defendant's rights under Miranda v. Arizona, 384 U.S. 436 (1966). The courts below found, on the basis of a signed waiver form, that petitioner had voluntarily and knowingly waived his Fifth and Sixth Amendment rights to remain silent and to have counsel present during in-custody interrogation, despite the fact that petitioner refused to sign a transcribed statement, asserting that he wanted to see a lawyer first. The signing of such a waiver form by itself[14/] cannot support a finding of waiver in these circumstances, since it is clear that petitioner did not fully understand the consequences of his oral answers to police interrogation. The reading to the jury of petitioner's unsigned confession, R. 236-239, taken under such circumstances, was reversible error.

The record indicates that petitioner was taken from Memphis, Tennessee, to the Union County Jail in Monroe, North Carolina, on February 23, 1973. R. 228. That evening petitioner was interrogated by Sheriff Frank Fowler and Deputy Sheriff W. F. McGuirt in the conference room of the Jail. Sheriff Fowler read

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14/ The use of printed waiver forms containing a statement of the Miranda warnings and a declaration that the suspect has been given the warnings, understands them, and does not desire the assistance of counsel during interrogation, is an important method of implementing Miranda. See Project, "Interrogations in New Haven: the Impact of Miranda", 76 Yale L. J. 1519, 1551 (1967)

petitioner a statement of the Miranda "rights,"[15] R. 229, and petitioner signed a form which stated that he understood these rights and did not wish to have counsel present with him during interrogation.[16] In response to the questions of the two police officers, petitioner then gave a detailed description of his activities on February 11, 1973. He admitted that he escaped from Odom Prison on February 9, that he abducted a "small black girl" in Charlotte on February 11, telling her "to shut up or I would hurt her," R. 236, that he had sexual relations with her

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15/ Sheriff Fowler testified that he:

> "advised the [petitioner] as follows: 'Before we ask you any questions, you must understand your rights, you have the [right to] remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you have talked to a lawyer.' "

R. 230-231

16/ This form contained the statement of rights which Sheriff Fowler read, note 15, supra, and also contained the following statement:

> "I have read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone."

R. 231. Petitioner's signature followed the word "anyone." Ibid. This form and petitioner's unsigned four page statement were admitted into evidence at the hearing on the voluntariness of the statement as State's Exhibit 1-B. R. 231, 239, 299.

after tying her up and driving into the country,[17] that he stabbed and killed David Timothy Parker,[18] that when a family stopped to help pull his car out of the ditch, he "did not know what I might have done to them if they had seen the body" in the front seat, R. 238, that he put the body into a ditch, that he narrowly escaped being captured by Charlotte policemen who chased him in their car and on foot, and that he stole another car and drove to Memphis.

Sheriff Fowler testified that he transcribed by hand petitioner's statement, but that petitioner then refused to sign it: "he wouldn't sign it until after the court appointed him a lawyer and he talked to him, said then he probably would sign it. . . . [H]e said that he knew and understood that the court would appoint him one when he came to court." R. 232. On cross-examination, Sheriff Fowler repeated that:

> "During some state of the interview, he stated that he knew the court would appoint him a lawyer when he came to court. He made no other statements concerning a lawyer at that time, that's all that he said. . . . [H]e said . . . I probably will sign it after the court appoints me a lawyer. He said they will appoint me one when I go to court, won't they, and I said they will. That's the only statement he made concerning a lawyer." R. 233.

It is clear from this testimony that petitioner did not realize that his oral statements could be introduced against him in court. In Miranda v. Arizona, supra, at 469, this Court required that:

17/ Petitioner denied that he raped Gwendolyn Blackmon. He stated that when they arrived in the country he "told the girl I wanted her car, and she could get out, but the girl would not leave her car." R. 237. By petitioner's account, they conversed briefly and then voluntarily "made love." Ibid.

18/ Petitioner gave an explicit account of the slaying:

> "I, Jarrette, pulled out a scout knife out of my belt and stabbed the boy 2 times, once in the upper chest and once in the shoulder. The boy was striking at me, Jarrette, when I, Jarrette, stabbed him. The stab in the chest killed him about 2 or 3 minutes, in about 2 or 3 minutes, I think. Blood was coming out of his mouth when I stabbed him in the chest."

R. 238.

> "[t]he warning of the right to remain silent . . . be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."

Although petitioner signed a form indicating that the Miranda "rights" had been read to him, it is clear that he did not fully comprehend the nature of his right to remain silent. It is not enough simply to read the warnings to an incarcerated defendant and secure his signature to a waiver form: "The warnings required and the waiver necessary in accordance with [Miranda] . . . are . . . prerequisites to the admissibility of any statement made by a defendant." Miranda v. Arizona, supra, at 476 (emphasis added). For both "warnings and waiver of rights [are] a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Ibid.

Proof of the effective waiver of Miranda rights requires more than production of a waiver form signed by a defendant. This Court has always set high standards of proof for the waiver of basic constitutional rights:

> "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we do not presume acquiescence in the loss of fundamental rights' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Escobedo v. Illinois, 378 U.S. 478, 490 n. 14 (1964). The presumption against finding waiver of Miranda rights is based on "the need to protect the fairness of the trial itself." Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973).

Petitioner's refusal to sign the statement Sheriff Fowler transcribed was, therefore, a reservation of a right to refuse

its use, since petitioner implicitly stated that he would refuse to sign if his court-appointed attorney so advised him. Petitioner's statements that he knew such an attorney would be appointed to assist him "in court" also raises an inference that, regardless of the statement he signed, he did not really comprehend that he had a right to have a lawyer present during interrogation.

Petitioner's statements indicate that he sought to claim another of his Miranda rights:

> "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice."

Miranda v. Arizona, supra, at 473-474 (footnote omitted) (emphasis added). Petitioner clearly indicated his mistaken belief that nothing he said could be used against him unless he signed a written statement, and he also plainly demonstrated his desire to confer with a lawyer before he allowed what he told the police to be formally used against him. Petitioner's belief that he was talking "off the record" to the police means that he did not "intelligently and understandingly reject," Carnley v. Cochran, 369 U.S. 506, 516 (1962), his right to remain silent. Under these circumstances, it was error to read petitioner's statement to the jury, since the State has not met its "heavy burden"[19/] of showing waiver.

19/ Miranda v. Arizona, supra, at 475:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . . Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place . . . the burden is rightly on its shoulders."

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS DENIED BY THE TRIAL COURT'S REFUSAL TO GRANT HIS CHANGE OF VENUE MOTION, MADE ON GROUNDS OF PREJUDICIAL PRE-TRIAL PUBLICITY.

Intense newspaper publicity in Union County, North Carolina, attended petitioner's escape from Odom Prison, the commission of the crimes for which he was subsequently convicted and sentenced to die, the official declaration that he was an "outlaw", his arrest by the FBI, and the preliminary hearing at which he was bound over for trial. An important issue is presented by this publicity as to whether denial of petitioner's change of venue motion and motion for a special venire, R. 40, violated his"right .. . to . . . a fair trial by a panel of impartial, 'indifferent' jurors", Irvin v. Dowd, 366 U.S. 717, 722 (1961), guaranteed him by the Fourteenth Amendment.

This Court has recognized that no defendant should be punished for a crime without "a charge fairly made and fairly tried, in a public tribunal free of prejudice, passion [and] excitement." Chambers v. Florida, 309 U.S. 227, 236-237 (1940). The jury's verdict must be "based on evidence received in open court, not from outside sources." Sheppard v. Maxwell, 384 U.S. 333, 351 (1966). See also Groppi v. Wisconsin, 400 U.S. 505 (1971). Notwithstanding these constitutional commands, the Supreme Court of North Carolina rejected petitioner's claim that he could not receive a fair and impartial trial in Union County on the grounds that: "[t]he newspaper stories were not

inflammatory in nature . . . [and that the crimes with which petitioner was charged] attracted the attention of all the news media of the State. The defendant offered no evidence that such publicity was more widespread in Union County than in any other county to which the case might have been removed." 202 S.E.2d at 729 (App.A at 9a).

Petitioner submits that the test applied by the Court below is inappropriate to determine when the Fourteenth Amendment requires a change of venue under the rulings of Sheppard v. Maxwell, supra, and Estes v. Texas, 381 U.S. 532 (1965), since it places upon petitioner the burden of demonstrating a forum in which he can receive a fair trial. Once a criminal defendant has made a prima facie showing that it will be impossible for him to receive an impartial trial in the immediate area because of prejudicial publicity, the State should be obliged at least to undertake an affirmative and properly searching inquiry to find a constitutionally uncontaminated forum. This Court has required nothing less than "a diligent, good faith effort," Smith v. Hooey, 393 U.S. 374, 383 (1969); and see Barber v. Page, 390 U.S. 719, 725 (1968), to comply with constitutional requirements before their disregard can be excused - if it ever can - upon a plea of infeasibility. Surely nothing less should be required when the basic right to a fair trial is in question.

Union County, where petitioner was tried, is in the far western part of North Carolina. There is simply no evidence in this record as to whether there was prejudicial publicity concerning this crime in, for example, the eastern part of the State. All of the State's witnesses, R. 31-39, were qualified

to testify only concerning publicity in the Charlotte-Monroe area, and all of the newspaper clippings introduced by petitioner were either from the Charlotte or Monroe newspapers.[20] The issue of whether a criminal defendant has the burden of demonstrating the existence of another forum in the State which is less infected with publicity, or whether the burden of inquiring falls on the prosecution or the court once the defendant has shown that he cannot obtain a fair trial locally, was thus dispositive in this case.

For petitioner clearly made a convincing showing that Union County, a county of approximately 60,000 persons, R. 39, was inflamed against him by prejudicial publicity. It was in this county that petitioner was officially proclaimed an "outlaw" (see Appendix B for a copy of this Outlawry Proclamation.) Under N.C. Gen. Stat. §15-48,[21] such a declaration places a

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20/ A file of newspaper clippings was submitted by petitioner in support of his motion. Defendant's Exhibit No. 1, R. 26. This file was transmitted to the Supreme Court of North Carolina and is being certified to this Court.

21/ This section provides:

> Outlawry for felony.- In all cases where any two justices of the peace, or any justice or judge of the General Court of Justice, or any judge of a criminal court shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county wherein such person is supposed to lurk or conceal himself are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the State in

fugitive beyond the protection of the law if he refuses to surrender and authorizes the use of deadly force by any citizen. In Union County, it was proclaimed that:

> [I]f the said fugitive, HENRY N. JARRETTE, continues to conceal himself and does not immediately surrender himself as herein directed, any citizen of this State may capture, arrest and bring the said fugitive to justice; and, in case the said fugitive attempts to flee or to resist capture when called on to surrender, any citizen may slay him, the said HENRY N. JARRETTE, without accusation or impeachment for any crime. (App.B)

During jury selection, one of the veniremen remarked that he had read petitioner had been declared an "outlaw." R. 80.

21/ cont'd.

> which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continued to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the State may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime.

The publicity concerning petitioner and the crimes with which he was charged was far more intense in Monroe, the county seat of Union County, than in Charlotte, [22] and it is reasonable to assume that in other parts of the State the coverage of the crimes would not be as unfavorable to petitioner. In Monroe, newspaper stories flatly stated that petitioner was a killer and a rapist, repeatedly referred to him as an outlaw who could be killed on sight if he refused to surrender, [23] discussed at length the other crimes of which he had been convicted, and related in great detail the evidence against him provided by the State's witnesses at the preliminary hearing.

On February 14, 1973, [24] the Monroe Enquirer-Journal proclaimed in banner headlines on its front page, KIDNAPED YOUTH'S BODY DISCOVERED LAST NIGHT, and in slightly smaller headlines,

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22/ As indicated above, all of the newspaper clippings introduced were from these two cities, which are approximately 30 miles apart. Petitioner introduced 10 clippings from the Monroe Enquirer-Journal and 8 clippings from Charlotte newspapers concerning the crimes petitioner was charged with and two clippings indicating shake-ups in the State prison system after petitioner's escape.

23/ It is a relevant constitutional consideration that adverse publicity concerning a criminal defendant emanates from state officials. United States ex rel. Vloeth v. Denno, 313 F. 2d 364 (CA2 1963).

24/ The first publicity in Monroe concerning petitioner is apparently the February 12 Monroe Enquirer-Journal front page story, headlined WAXHAW AREA YOUTH KIDNAPED BY RAPIST, which describes "Henry Jarrett" as a suspect.

SLAIN BY ESCAPEE-RAPIST. The second paragraph of the story reported that the dead youth "was stabbed in the throat by a man who has since been identified as Henry Jarrette," and the fourth paragraph stated:

> PLANNED TO KILL
> Jarrette is reported to have kidnaped a 16-year old girl from near the main branch of Charlotte Library, forced her into the back seat of her car, and drove to a point in Union County, where she was raped.
> She was told by Jarrette that her life would be spared, but that "I'm gonna kill someone, and I'm gonna get me a car and go to Tennessee."

The story also noted that "[t]he brutal and senseless murder has stunned and outraged people over a wide area, particularly those with Waxhaw ties" and reported that rewards are being offered for petitioner's capture. A February 16 Enquirer-Journal story proclaimed in large banner headlines: OUTLAW JARRETTE HELD UNDER $100,000 BOND, and in slightly smaller headlines, IDENTIFIED AS RAPIST KILLER. The opening paragraph of this story stated:

> An escapee who killed a [Rural Route] 3 Waxhaw youth, then stole his car and who had earlier raped a Charlotte girl at knife-point and abducted her was captured without incident in Memphis, Tenn., yesterday afternoon.
>
> The FBI announced that its agents had arrested Henry N. Jarrette, a Louisiana native who had been declared an outlaw in North Carolina -- to be shot to death with impunity if he didn't surrender on demand.

The story continued later that:

> Jarrettee [sic] was identified as the man who abducted a 16-year old Charlotte girl and brought her to Union County in her car Sunday.
>
> Near Wesley Chapel he raped her, then drove to

> Waxhaw in his hunt for "someone to kill and a car to go to Tennessee", as the girl later related.
>
> He saw David Timothy Parker . . . . then stabbed him in the chest, got in the car, and later abandoned Parker's body in a ditch along the old Marvin Road, 5.4 miles from where he killed him.

Petitioner's prior criminal record was also recounted in detail.

The publicity concerning petitioner continued in the Monroe newspapers until petitioner's trial began. On February 23, the Enquirer-Journal headlined its front page story, BOND HEARING SCHEDULED FOR JARRETTE IN MEMPHIS, and cut into the story's text with a box which contained the headline BULLETIN! which recounted that petitioner was being returned to North Carolina for trial. Full page headlines in the February 26 Enquirer-Journal declared: OUTLAW JARRETTE TAKEN TO RALEIGH, and the story recounted that petitioner had been placed under control of state authorities "because he is a dangerous criminal."[25/]

25/ The story also noted that "Jarrette was serving up to 28 years for stabbing a man and woman to death two years ago." An undated story from the Enquirer-Journal gives a lengthy account of how petitioner was declared an outlaw and describes in detail the rape victim's story of how "the accused rapist-slayer pulled a knife and thrust it through the open window of [the deceased's] car." The story stated that petitioner had been turned over to state authorities "because he is a dangerous criminal."

Petitioner's preliminary hearing was extensively covered in Monroe. The March 21, 1973, headlines of the Enquirer-Journal announced: JARRETTE BOUND OVER, RAPE-SLAYING EVIDENCE HEARD IN DISTRICT COURT, JARRETTE EVIDENCE HEARD. The accompanying story recounted in detail the preliminary hearing testimony, noting in the second paragraph that the State's witnesses had "put together a startling chain of events." Petitioner was quoted as saying to the rape victim, "I only wish you were white. If you were, I'd rape you, kill you, and take your car," and "If I find a white person, I'll stick my knife in him as far as it [will] go." The Sheriff was quoted as saying that the charges of rape and murder "did not seem to bother petitioner." On June 14, 1973, the Enquirer-Journal front page headlines read: 57 DEFENDANTS TO STAND TRIAL IN SUPERIOR COURT, and in smaller headlines, JARRETTE'S CASES FIRST. The third paragraph of the story noted that petitioner sought a change of venue "because of all the publicity that the case received in the press in Union and Mecklenburg counties."

During the hearing on petitioner's change of venue motion, the witnesses who testified for the State, while asserting their belief that petitioner could receive a fair trial in Union County, did not deny that the cases had received great publicity in the County. One witness noted that she did not "believe [she] could forget that [petitioner] is an escaped murderer," R.33; another noted that "[t]here is a lot of bitterness in the Waxhaw area concerning the case," R. 34, and another, while asserting that petitioner could get a "fair and

impartial trial in this county", admitted that there was also "a right good bit of bitterness concerning this case." R. 38. Petitioner introduced a file of newspaper clippings, six affidavits, and the testimony of three witnesses in support of the motion for removal.

A defendant in a criminal case should not have to demonstrate that there is *somewhere* he can recieve a fair and impartial trial. Petitioner carried "the burden of showing essential unfairness . . . as a demonstrable reality," Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942), demonstrated that "there has been prejudicial publicity requiring action by the Court". Wansley v. Slayton, 487 F. 2d 90, 92 (CA4 1973). After petitioner made this showing, he should not also be saddled with the requirement of proving that there exists elsewhere a forum with the "judicial serenity and calm to which [he is] entitled." Paton v. Texas, supra, at 536. That requirement by the North Carolina Supreme Court here can find no justification in the constitutional holdings of this Court. Rather, "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by . . .[a] . . . wave of public passion." Irvin v. Dowd, supra, at 728.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES E. GRIFFIN
CHARLES D. HUMPHRIES
310 N. Church Street
Monroe, North Carolina 28110

ADAM STEIN
Chambers, Stein, Ferguson & Lanning
157 East Rosemary Street
Chapel Hill, North Carolina 27514

JACK GREENBERG
JAMES M. NABIT, III
PEGGY C. DAVIS
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

JACK HIMMELSTEIN
439 West 116th Street
New York, New York 10027

ATTORNEYS FOR PETITIONER

APPENDIX A

Opinion of the Court Below

STATE of North Carolina

v.

Henry N. JARRETTE.

No. 46.

Supreme Court of North Carolina.

Feb. 25, 1971.

Defendant was convicted in the Superior Court, Union County, John D. McConnell, J., of first-degree murder, rape, and kidnapping, and he appealed. The Supreme Court, Lake, J., held that refusal to sever charges was not error, that denial of motion for change of venue was not an abuse of discretion, that permitting prosecutor to ask prospective jurors their views concerning death penalty was not error, that juror who saw television news report about case was competent to sit, that admission of evidence showing that defendant was an escaped prisoner was not error, that refusal to submit to jury lesser included offenses of rape and homicide was not error, and that imposition of death penalty was not a violation of the Federal Constitution.

No error.

Bobbitt, C. J., filed an opinion dissenting as to death sentences in which Higgins, and Sharp, JJ., joined; Sharp, J., filed an opinion concurring further in the dissenting opinion of Bobbitt, J.

1. Criminal Law ⇐620(1)

Consolidation of cases arising from a continuing criminal episode is within discretion of trial judge. G.S. § 15-152.

2. Criminal Law ⇐620(1)

Consolidation of charges of murder, rape, kidnapping and armed robbery was not error, where such crimes constituted a continuing criminal episode occurring during a two and one-half hour time span. G.S. § 15-152.

3. Criminal Law ⇐121

Jury ⇐70(3)

Motions for removal of cases to another county for trial or for summoning of special venire from another county were directed to discretion of trial court.

4. Criminal Law ⇐121

Jury ⇐70(1)

Trial court did not abuse its discretion in denying motions for removal of cases to another county for trial and, on denial of that, for summoning of special venire from another county based on ground that defendant could not obtain fair and impartial trial in county because of publicity in various news media concerning offenses, where such newspaper stories were factual and well within normal limits of newspaper reporting of criminal activity and were not inflammatory in nature. G.S. § 1-84.

5. Criminal Law ⇐166(1)

County in which kidnapping occurred was proper venue for trial of kidnapping charge.

6. Criminal Law ⇐145

Venue may be waived by a defendant and is waived by his going to trial without requesting transfer to proper county.

7. Criminal Law ⇐13(3), 913(1)

Defendant's motion to remove prosecution for rape, murder and kidnapping from Union County on ground of local prejudice was not a request to transfer case to Mecklenburg County which was proper venue for trial of kidnapping charge; thus, placing defendant on trial in Union County was not ground for new trial on charge of kidnapping.

8. Jury ⇐131(13)

Motion that prospective jurors be questioned separately out of presence of other selected or prospective jurors was addressed to sound discretion of trial judge.

9. Jury ⇐131(13)

Denial of pretrial motion that prospective jurors be questioned separately out of presence of other selected or prospective jurors was not an abuse of discretion.

10. Jury ⇐131(3)

Prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party propounding the question may exercise intelligently his peremptory challenges. G.S. § 9-17.

11. Jury ⇐131(6)

Allowing prosecutor in prosecution for murder, rape and kidnapping to ask jurors if they had any moral or religious scruples or beliefs against imposition of death penalty was not error.

12. Jury ⇐108

Sustaining of solicitor's challenges to five prospective jurors who stated on voir dire that they were unable to return a verdict imposing death penalty under any circumstances was not error.

13. Criminal Law ⇐667

A mistrial is not lightly granted; granting of motion for mistrial rests largely in discretion of trial judge.

14. Jury ⇐120

Denial of motion for mistrial based on statement of prospective juror who, in presence of other prospective and selected jurors, stated he believed he read that defendant had been declared an outlaw, who later stated he had no opinion as to defendant's innocence or guilt and who was never challenged for cause was not error.

15. Jury ⇐103(2)

Even though prospective juror challenged for cause stated that he had seen television news report about case the night before he was called into jury box, where juror held no preconceived idea concerning defendant's guilt or innocence and told court that he could give defendant a fair and impartial trial without being influenced by what he heard on television report, juror was competent to serve.

16. Criminal Law ⇐369(2)
Homicide ⇐169(8)

Hearsay testimony of homicide victim's brother that victim, at time he borrowed brother's automobile and immediately before driving off in automobile, stated he was going to Lumberton to particular city was admissible under exception to hearsay rule permitting admission of declarations of decedent to show his intent and was also admissible as part of res gestae of the borrowing and departure.

17. Criminal Law ⇐1167.1(5)

Even if hearsay testimony of homicide victim's brother that victim, at time he borrowed brother's automobile, stated that he was going to Lumberton was not admissible as an exception to hearsay rule, where only effect of such evidence was to tend to identify victim as boy whose defendant stabbed and other evidence in case established such fact beyond controversy, admission of evidence was, at most, harmless error.

18. Criminal Law ⇐339

Evidence was sufficient to support findings that in-court identification of defendant by police officer was based on what officer saw in the course of his pursuit of automobile and its driver and not on photographs shown officer at subsequent time.

19. Criminal Law ⇐339

Refusal to strike police officer's in-court identification of defendant was not error, where in-court identification was based on what police officer saw in course of his pursuit of automobile and its driver and had origin independent of subsequent showing of photographs to officer, evidence did not indicate a substantial likelihood of irreparable misidentification due

to officer's inspection of photographs and officer's identification of defendant as man he pursued was corroborated by other evidence.

20. Criminal Law ⇐1158(4)

Where evidence on voir dire examination supported trial court's findings that FBI agents conducting interrogation advised defendant of his rights and that defendant waived such rights and made statements freely and voluntarily, such findings were conclusive on appeal.

21. Criminal Law ⇐519(3)

An in-custody confession is competent if made voluntarily after defendant has been given proper warning of his constitutional rights and has full knowledge thereof.

22. Criminal Law ⇐375

Where defendant does not take stand as a witness, evidence of his bad character is not competent and state may not introduce evidence showing that defendant committed another and criminal offense.

23. Criminal Law ⇐[illegible]

Even though FBI agent's statement inferring that defendant escaped from prison prior to committing the crimes charged was not responsive to question propounded to him by solicitor, where court, upon defendant's motion, properly instructed jury not to consider such statement, agent's statement was not grounds for mistrial.

24. Criminal Law ⇐1163.11

Even though FBI agent's testimony regarding defendant's oral statement, defendant's written confession and sheriff's testimony concerning oral statement made by defendant referred to defendant having escaped from prison prior to his commission of crimes charged, where defendant's objection to such evidence was general and his motion to strike was directed to entire testimony and document and not to particular references regarding his escape and where admission of such objectionable statements relating to escape did not contribute to defendant's conviction, admission of such evidence did not require reversal of conviction.

25. Criminal Law ⇐1172.2

Failure to include words "or any part" in charge that jury could believe all that witness said or none was a technical omission which could not have affected result and which did not entitle defendant, who did not request further instructions at conclusion of entire charge, to a new trial.

26. Criminal Law ⇐[illegible]

Where trial judge fully and accurately defined crime of rape in preceding paragraph of contested charge and insertion of commas before and after the phrase "after placing her in back seat" in charge that defendant should be found guilty if State showed he had sexual relations with victim in back seat of car after placing her in back seat by use of force and without her consent and against her will would make charge completely accurate, giving of charge was not error.

27. Criminal Law ⇐[illegible]

It is not necessary for court to submit to jury a lesser included offense or to instruct jury thereon where there is no evidence tending to show defendant may be guilty of such lesser offense.

28. Rape ⇐[illegible]

Where all of evidence, including defendant's statements, showed completion of act of sexual intercourse after female victim was abducted with threats to injure her and transported with her hands tied behind her back to lonely spot on rural road and there was no evidence whatever that victim yielded except through fear of serious injury, failure to charge jury concerning lesser included offenses of rape and instructing jury they could return verdict of guilty of rape or a verdict of not guilty was not error.

29. Robbery ⇐1

Where defendant stabbed and killed motorist for purpose of stealing automobile which he was driving, larceny of automobile was robbery. G.S. § 14-87.

30. Homicide ⇐18(5)

Murder committed in perpetration of robbery is murder in the first degree. G. S. § 14-17.

31. Homicide ⇐308(5)

Where all of evidence, including defendant's statements to arresting officers, was to the effect that defendant stabbed and killed motorist for purpose of stealing automobile in which motorist sat and that killing was done with premeditation and deliberation, failure to instruct jury concerning lesser degrees of homicide and giving of instruction that jury could return verdict of guilty of murder in first degree or verdict of not guilty was no error.

32. Homicide ⇐309(1)

Kidnapping ⇐5

Rape ⇐58(1)

Evidence supported convictions of kidnapping, rape and first degree murder.

33. Arson ⇐45

Burglary ⇐39

Homicide ⇐251

Rape ⇐61

In light of United States Supreme Court decision that death penalty imposed under statute permitting either judge or jury to impose death penalty as matter of discretion is unconstitutional, meaning of statutes which make death a punishment for first-degree murder, rape, first-degree burglary or arson but provide that punishment may be life imprisonment if jury so recommends is that a defendant who commits such an offense after date of State Supreme Court's decision invalidating proviso regarding life imprisonment must be sentenced to death with trial judge having no discretion in matter of sentence to be imposed and jury having no authority fix a different punishment. U.S.C.A. Const. Amends. 8, 14; G.S. §§ 14-17, 14-21, 14-52, 14-58.

34. Courts ⇐91(1)

Determination of what statutes state mean, with reference to punishment to be imposed for criminal offenses, is not a federal question but a question of state law and that determination thereof by State Supreme Court is authoritative.

35. Courts ⇐91(1)

Meaning of State Constitution is matter of state law upon which decision of State Supreme Court is final.

36. Courts ⇐507(5, 10)

Question of whether a state statute which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape be sentenced to death violates Eighth and Fourteenth Amendments to Federal Constitution is a federal question and determination of question by State Supreme Court is subject to review by the United States Supreme Court. U.S.C.A.Const. Amends. 8, 14.

37. Constitutional Law ⇐250.3(1), 253(5)

Equal protection clause of Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment and due process clause of 8th amendment protects liberty as well as life. U.S.C.A.Const. Amend. 14.

38. Criminal Law ⇐5

Legislature has the authority to abolish the death penalty. Const.N.C., art. I, § 2.

39. Statutes ⇐220

Where Supreme Court decision holding that death penalty was mandatory punishment upon conviction of first-degree murder or rape was well publicized and bills were promptly introduced in legislature to counteract decision and to abolish

Cite as 292 S.E.2d 721

death penalty, legislature's failure to pass such bills showed that decision was not contrary to intent of legislature. Const. 1970, art. II, § 2.

40. Criminal Law ⇐1205

Retribution is a constitutionally permissible ingredient in the imposition of punishment.

41. Constitutional Law ⇐70.1(10)

It is not function of court to determine most efficacious punishment for crimes of first degree murder and of rape; that is function of legislature.

42. Homicide ⇐357

Rape ⇐61

Mandatory imposition of death sentence upon conviction of first degree murder or rape meets constitutional standard for attaining goals of criminal punishment.

43. Constitutional Law ⇐70.2(1), 270

Criminal Law ⇐1213

Imposition of death penalty upon conviction of first-degree murder or rape is not, per se, a violation of Eighth and Fourteenth Amendments to Federal Constitution. U.S.C.A.Const. Amends. 8, 14; G.S. §§ 14-17, 14-21; Const.1970, art. II, §§ 1, 2.

The defendant was found guilty of the rape of Gwendolyn Blackmon, a 16 year old Negro girl; the first degree murder of David Timothy Parker, a 16 year old white boy; the kidnapping of Gwendolyn Blackmon; and the armed robbery of David Timothy Parker. He was sentenced to death for the rape and for the murder and to imprisonment for life for the kidnapping. Prayer for judgment was continued on the charge of armed robbery, the State having relied upon this felony as an essential element of the murder in the first degree. The defendant appealed from all three of the judgments imposed, setting forth 126 assignments of error, many of which were abandoned in his brief. Many others present the same question of law.

Prior to the selection of the jury, the defendant made certain pretrial motions, including a motion for change of venue. From exhibits offered by the defendant in support of this motion, it appears that on 6 February 1973 the defendant was serving a sentence of 24 to 28 years in Ohio Prison for two murders by stabbing with a knife, a circumstance not disclosed by the evidence presented in the presence of the jury in the present cases. It further appears from these exhibits that he was permitted to leave the prison on that date to attend a state convention of the Junior Chamber of Commerce (Jaycees), he being an officer in the chapter of that organization established in Union Prison. While at the convention, he eluded the guard who had accompanied him and escaped. Two days later, he was in Charlotte and engaged in the activities from which the present charges arise. Four days thereafter, he was arrested by agents of the Federal Bureau of Investigation in Memphis, Tennessee. Waiving extradition, he was returned to Union County for trial.

The defendant offered no evidence before the jury. That introduced by the State showed, in substance, the following:

At approximately 3:30 p. m. on Sunday, 11 February 1973, Gwendolyn Blackmon, a 16 year old Negro high school student, drove alone in her automobile to the Charlotte Public Library. As she was getting out of her car in the parking lot, a man, whom she had never seen before but whom she positively identified, in court, as the defendant, pushed her back into the car, telling her that if she screamed or did not "go along with what he said," he would kill her, tied her hands behind her back, showed her a "scout knife," compelled her to lie down on the seat, took her keys from her purse and drove off with her in the car, telling her he was a sex maniac.

Upon arriving at a location, subsequently pointed out by Gwendolyn Blacknon to the sheriff, on a dirt road in rural Union County, the defendant put the girl into the back seat of the car, disrobed her completely and, with the knife at hand, had sexual intercourse with her, following which he committed an unnatural sexual act upon her. When, prior to these acts, she begged him not to touch her, he replied that he "didn't like for people to beg him, so please stop begging." Following these acts, he instructed her to get dressed and, when she did so, he retied her hands behind her back. They returned to the front seat of the car and the defendant drove to the town of Waxhaw. En route, he told her he wished she were white because, if she were, he would kill her, but "if he could find a way of getting another car," he would give her car back to her and let her go free.

Arriving at the launderette in Waxhaw, the defendant parked beside another car, a 1971 Pontiac Grand Prix, yellow with a cream vinyl top, in which a 16 year old white boy, David Timothy Parker sat alone. The defendant, taking the keys to Gwendolyn Blacknon's car with him, and leaving her in her car with her hands still tied behind her back, walked over to the boy's car. The Parker boy rolled down his window and the defendant engaged him in a brief conversation. The defendant then pulled the knife from his pants and stabbed the boy twice. The boy tried to get out of the other side of his car but was unable to do so. The blood was gushing from his mouth and nose. The defendant shoved the dying boy over onto the passenger's side of the front seat, got in the car and drove away. He returned momentarily to untie Gwendolyn Blacknon's hands and give her back the keys to her car. Thereupon, she returned to her home in Charlotte and reported what had happened to her parents and to the police.

At about 5:00 p. m. that afternoon, David Timothy Parker had borrowed his brother's 1971 Pontiac Grand Prix, yellow with a white vinyl top, saying he was going to the launderette. On 13 February, his body was discovered in a road ditch, 5.4 miles from the Waxhaw launderette. The cause of his death was a deep stab wound in the left chest. The Parker automobile was discovered in Charlotte, the night of 11 February. Its interior was quite bloody. No one other than David Timothy Parker had the owner's permission to drive it.

At approximately 9:40 p. m. on 11 February, Charlotte Police Officers Griffin and Callahan, while patrolling in a police automobile, observed the Parker car parked beside a telephone booth and a man identified, in court, by Officer Griffin as the defendant, standing in the booth. They turned into the parking lot. As they drew near the Parker automobile, the defendant drove away in it. The officers pursued him with their blue light flashing and siren blowing. They bumped the Parker car several times in unsuccessful efforts to stop it. Finally, the defendant slowed down, jumped from the car and fled on foot. He was pursued by Officer Griffin but escaped by climbing over a fence while the officer was unable to climb. On the ground at that point, Officer Griffin found a coat containing a motor vehicle registration card bearing the defendant's name. The coat was identified by Gwendolyn Blacknon as the one worn by her assailant. A "hunting knife" was found in the glove compartment of the Parker automobile by the police officers. It was not there when the vehicle was lent by its owner to David Timothy Parker. It was identified by Gwendolyn Blacknon as the knife used by her assailant in her abduction and in the stabbing of David Timothy Parker.

On 19 February, F.B.I. Agents Daly and Cooper located and arrested the defendant in Memphis, Tennessee, a warrant charging unlawful flight having been issued for his arrest. The defendant was then carrying in his pocket a kitchen knife with a six-inch serrated blade. Following a voir dire examination, duly conducted

ite vinyl top, saying he was
laundrette. On 13 February,
was discovered in a roadside
iles from the Washaw launder-
ause of his death was a deep
in the left chest. The Parker
was discovered in Charlotte, the
l February. Its interior was
y. No one other than David
arker had the owner's permis-
e it.

the trial court found that the defendant had been given the full Miranda warning by these officers, had signed a written waiver of his right to counsel prior to interrogation by them, was then not under the influence of intoxicating beverages, was experienced in matters of police interrogation, was well versed in his constitutional rights, was not threatened or promised any reward and signed voluntarily a written statement, which statement was admitted into evidence. It was to the following effect:

While in Raleigh attending a Jaycee meeting, the defendant walked away. By "hitching" rides and traveling by bus, he arrived in Charlotte. There he saw a Negro girl getting out of her car near the library, "told her to shove over and put to holler" or he would hurt her, took her in her car out into the country and there "made love" to her after explaining that he did not want to hurt her. Then he drove on with the girl in her car, to Washaw where they observed a white boy sitting in a car in the parking lot of a launderette. The defendant parked close to the other vehicle, got out, approached the boy, engaged him in a brief conversation, pulled out his knife, stabbed the boy, shoved him over to the passenger's side where he died in two or three minutes, and drove off with the boy's body in the car. After having crossed fifteen or twenty minutes, he put the body in the ditch and proceeded back to Charlotte where he stopped at a telephone booth, and called his mother in Louisville. After having the telephone booth, he was observed and chased by two Navy officers whom he evaded. He stole another car in Mocksville and drove to Knoxville, Tennessee, where he took a bus to Memphis.

Thereafter, in an oral statement, also found by the court to have been made voluntarily, following the full Miranda warning, the defendant told these F.B.I. agents that after leaving Washaw with the body of the Parker boy in the car, he became stuck in a ditch due to snow; a motorist, passing by with his wife and several children, stopped and helped him to get out of the ditch; had the motorist observed the body of the Parker boy in the car, the defendant "would have had to kill the man and his family." He further stated to Agent Cooper that he felt no guilt at the murder of the young boy in Washaw, and that if he had the opportunity he would kill Agent Cooper.

On the evening of 11 February, Gwendolyn Blackmon gave to Sheriff Fowler of Union County a statement concerning the abduction, the rape, the murder and the theft of the Parker car which was eventually the same as her testimony in court, above summarized. She then accompanied Sheriff Fowler to and pointed out the place where the rape occurred and the launderette where the stabbing of the Parker boy occurred. At that time, she told the sheriff her assailant was "a black male, with a medium short Afro, a mustache" and "a gold tooth with an emblem of a star in the center of it." The defendant has such a tooth.

Sheriff Fowler retrieved the defendant from the federal officers in Memphis and returned him to North Carolina. After a voir dire, duly conducted, the court found as facts that the defendant was given the Miranda warning by the sheriff, signed a waiver of his right to counsel, was not under the influence of any intoxicating beverage or narcotic drug, was intelligent and well educated and that no promises or threats were made to him but that he freely and voluntarily and intelligently made a statement to Sheriff Fowler. Evidence on the voir dire examination supported these findings. The statement of the defendant to the sheriff was then admitted in evidence. It was to the following effect:

The defendant, a colored male born 1 October 1950, completed 12 grades in school. On 9 February 1973, he "escaped from Odom Prison." He went to Charlotte and on 11 February he saw "a small

black girl" getting out of her car and told her to get back in. She "hollered" and he told her to shut up or he would hurt her. She then got back in her car and he tied her hands behind her, told her to lie down in the car, which she did, and he drove away with her. After driving about 15 miles into the country, he told the girl he wanted her car and she could get out but she would not leave her car. He then drove on to a dirt road and parked and told the girl "if she stole love" he would not hurt her. Thereupon, he had sexual relations with her. Driving on to Wesley, he observed a white boy sitting in a Grand Prix Pontiac car in front of a laundromat. He told the girl he had to get another car, so he parked beside the Pontiac, went to the driver's side, told the boy he was having car trouble and asked the boy to help him. When the boy refused, the defendant pulled a "semi-white" knife from his belt and stabbed the boy twice, once in the upper chest and once in the shoulder. The boy was struggling at the defendant when the defendant stabbed him. The wound in the chest killed the boy in two or three minutes. The defendant then told the girl to leave, which she did. Her name was Gwendolyn Blackmon. The defendant then got in the white boy's car and rode around for about 15 minutes before he became stuck in a ditch, from which a passing motorist pulled him. The defendant "was glad the people who pulled him out of the ditch didn't see the body" as he did not know what he might have done to them if they had done so. The defendant then put the body of the white boy in a ditch and drove on to Charlotte where he was chased by but eluded the police officers. Going on to Mocksville he stole another automobile which he drove to Knoxville, Tennessee. From there he took a bus to Memphis where he was arrested.

Atty. Gen. Robert Morgan by Associate Atty. E. Thomas Maddox, Jr., Raleigh, for the State.

Griffin & Humphries by James E. Griffin and Charles D. Humphries, Monroe, for defendant.

Adam Stein, Julius LeVonne Chambers, Jack Greenberg, James M. Nabrit, III, Jack H. Himmelstein, Peggy C. Davis, New York City, and Anthony G. Amsterdam, for the NAACP Legal and Educational Fund, Inc., amicus curiae.

LAKE, Justice.

The principal thrust of the defendant's brief and the brief of the amicus curiae, in its entirety, are directed against the imposition of the death penalty for the crimes of first degree murder and rape. The defendant's remaining 125 assignments of error are directed to various rulings of the trial court which he contends entitle him to a new trial on all of the charges.

We do not reach the question of the validity of the judgments imposing the death penalty for first degree murder and for rape if the defendant is entitled to a new trial on these charges for the reason that he did not receive a fair trial in accordance with law. Therefore, we turn now to those 125 other assignments of error. Fifty of these are expressly abandoned by the defendant in his brief. Many of the others present the same question of law. Others are purely formal. Due to the gravity of the offenses charged and the punishment imposed, we have carefully considered the entire record and each assignment of error, including those abandoned, to determine whether the defendant is entitled to a new trial on any or all of the charges against him.

Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. § 15-152 provides:

"When there are several charges against any person for the same act or

transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . ."

[1, 2] The [illegible] evidence [illegible] that the victim swore to every essential element of the four crimes with which the defendant was charged occurred about 3:30 p.m. Eastern Standard Time, on 11 February 1973 and was concluded when it was just dark enough to require lights on automobiles. On that date, this would be approximately two and one-half hours. Obviously, the four offenses constituted a continuing criminal episode. See State v. Frazier, 280 N.C. 169, 185 S.E.2d 672; State v. Turner, 268 N.C. 775, 150 S.E.2d 395; State v. White, 262 N.C. 211, 137 S.E.2d 133; State v. Chapman, 92 N.C. 157, 19 S.E.2d 280. They were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. State v. Morrow, 262 N.C. 195, 136 S.E.2d 215; State v. McClain, 240 N.C. 171, 81 S.E.2d 364; State v. Harris, 223 N.C. 697, 28 S.E.2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. State v. Yoes and State v. Hale, 271 N.C. 619, 157 S.E.2d 350.

There was no error in the denial of the defendant's motions, heard before trial and in the absence of prospective jurors, for removal of the cases to another county for trial and, upon denial of that, for the summoning of a special venire from a county other than Union. The ground stated for each motion was that, due to the publicity in the various news media concerning these offenses and the resulting charges against the defendant, it would not be possible for him to obtain a fair and impartial trial in Union County by a jury composed of its residents. In support of his motion the defendant offered affidavits and copies of stories appearing in newspapers published in Union County and in Charlotte. The State offered, in opposition, a number of witnesses who expressed the opinion that the defendant could receive a fair and impartial trial in Union County by a jury composed of its residents.

The newspaper stories were not inflammatory in nature. All were well within the normal limits of newspaper reporting of criminal activity. Their substance was as follows: On 9 February 1953, the defendant was serving a term in the Orient State Prison for two murders. While in prison, he became president of a chapter of the Junior Chamber of Commerce (Jaycees), organized within the prison. On 9 February 1973, he was permitted by the prison officials to leave the prison to attend a Jaycee convention in Raleigh, accompanied by a guard. In place of the confidence that placed in him, he choked the guard at the convention and escaped. Two days later, three criminal offenses occurred and the victims of the kidnapping and rape identified the defendant as the perpetrator of all four of them.

These circumstances attracted the attention of all the news media of the State. The defendant offered no evidence that such publicity was more widespread in Union County than in any other county to which the case might have been removed in accordance with G.S. § 1-84. To hold that the defendant could not be tried in a county in which newspapers, carrying stories of the offenses and charges, circulated would preclude trial in any county of the State.

[3, 4] As the defendant concedes, these motions were directed to the discretion of the trial court. State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123; State v. Yoes and State v. Hale, supra; State v. Porth, 269 N.C. 329, 153 S.E.2d 10; State v. McKethan, 269 N.C. 81, 152 S.E.2d 341.

There is no indication whatever of abuse of discretion in their denial in the present instance. See: State v. Blackmon, supra; State v. Brinson, 277 N.C. 236, 177 S.E.2d 398; State v. Conrad, 275 N.C. 342, 168 S.E.2d 39.

[5-7] We observe, though the defendant did not raise the point, that the kidnapping occurred in Mecklenburg County. Thus, Mecklenburg County was the proper venue for the trial of that charge. Venue, however, may be waived by a defendant and is waived by his going to trial without requesting transfer to the proper county. State v. Ray, 269 N.C. 772, 153 S.E. 2d 6; Strong, N.C.Index 2d, Criminal Law, § 15. The motion for change of venue on the ground of local prejudice is not such a request. Consequently, plainly, the defendant on trial in Union County is not entitled to a new trial on the charge of kidnapping in this instance.

[8, 9] The defendant next moved, prior to trial, that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors. The ground was that this would avoid possibility that a prospective juror, in response to a question, might refer, in the presence of other prospective or previously selected jurors, to what he had read or heard through the news media concerning the defendant's being an escaped prisoner. This motion also was directed to the sound discretion of the trial judge. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745; State v. Perry, 277 N.C. 174, 176 S.E.2d 759. There was no abuse of discretion in its denial.

[10] Forty-four assignments of error relate to questions propounded by the Solicitor to the prospective jurors as to their views concerning the death penalty. No material difference in these questions is suggested by the defendant and we perceive none. Consequently, these assignments will be discussed together. It is to be observed that these assignments relate, not to the sustaining of a challenge by the State but merely to a propounding of a question to the prospective juror. Obviously, prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759; State v. Allred, 275 N.C. 154, 160 S.E.2d 833; State v. Atkinson, 275 N.C. 288, 305, 167 S.E.2d 241; G.S. § 9-15.

[11] The interrogations to which these assignments of error are directed are typified by the following question propounded to prospective juror, Mrs. McWhorter:

"Do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?"

No challenge to a prospective juror was sustained upon an affirmative answer to this question alone. The defendant asserts that merely "to ask such a question violates the spirit of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776." We do not so construe either the letter or the spirit of the Witherspoon decision. We have held many times that there is no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. State v. Roberts, 275 N.C. 111, 161 S.E.2d 345; State v. Yoes and State v. Vinson, supra, 271 N.C. at p. 643, 157 S.E.2d 350; State v. Spence, 271 N.C. 28, 155 S.E.2d 502. We consider below the effect of the Witherspoon decision upon rulings of the Superior Court sustaining challenges to prospective jurors following their responses to other questions propounded by the Solicitor.

[12] The defendant assigns as error the court's sustaining of the Solicitor's challenges to prospective jurors Bascom Haigler, Mosley, Mrs. McWhorter and Mrs. Purser, contending that the allowance of such challenges for cause violated "the spirit of Witherspoon." There was no mis-

terial difference in the questions and answers upon the basis of which those five challenges for cause were sustained. Those here quoted, directed to and given by prospective juror Hancon, after he had stated that he did not believe in the imposition of the death penalty, are typical:

"Q. On account of that moral or religious scruple, or scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty or murder in the first degree and thus participate in the trial that the defendant might be sentenced to death?

"A. Yes, sir, I couldn't do it.

. . . . . .

"Q. If you were chosen to sit on this jury, are you saying that you would not under any circumstances give any consideration to returning a verdict which would produce that penalty?

"A. No, sir.

"Q. That is what you are saying?

"A. That is what I am saying, I couldn't do it."

The sustaining of the challenges for cause to these five prospective jurors, in view of their responses on voir dire, was not a violation of either the letter or the spirit of Witherspoon v. Illinois, supra. As the defendant concedes, these rulings were in accord with our decision in State v. Sanders, 279 N.C. 275, 474 S.E.2d 337. They were also in accord with our similar rulings in State v. Anderson, 281 N.C. 291, 188 S.E.2d 336; State v. Watson, 281 N.C. 221, 188 S.E.2d 289; State v. Frazier, supra; State v. Boss, 279 N.C. 413, 183 S.E.2d 671; State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572, and many other recent decisions.

The defendant assigns as error the denial by the Superior Court of his motion for a mistrial due to a response by juror Larry McCoy to a question by the defendant before he was accepted as a juror. After Mr. McCoy had stated that he had heard about the case and probably had read it in the newspaper but had not seen it on television or heard it on radio, the interrogation proceeded as follows:

"Q. At the time you read about it did you form an opinion as to this man's innocence or guilt?

"A. Yes, sir.

"Q. Do you still have that opinion?

"A. No, sir.

"Q. What does it seem to have it?

"A. No answer.

"Q. You said you had formed an opinion as to his innocence or guilt but now you do not have it any longer. Did you just forget what you had read?

"A. Yes, sir. I didn't recall exactly what I had read then.

"Q. And you are saying that you cannot now recall what you read about this case?

"A. Not word for word. The main part that I remember was what read in my mind, [sic], I believe he was lectured on college. Is that not true? That's the part that stuck in my mind."

"MR. GRIFFIN (counsel for defendant): I move for a mistrial, your Honor.

"COURT: MOTION DENIED. EXCEPTION.

"Q. Mr. McCoy, as you sit there now do you have an opinion as to this man's innocence or guilt?

"A. No, sir.

"Q. Could you take what you read as being evidence of his innocence or guilt?

"A. No, sir."

The defendant did not elect to challenge this juror for cause or peremptorily. He

had not at that time exhausted his peremptory challenges. Mr. McCoy served on the jury.

This assignment of error is not directed to Mr. McCoy's service on the jury. It is directed to the denial of the defendant's motion for mistrial for his statement, in the presence of other prospective and selected jurors, that he remembered, he believed, hearing said that the defendant was depicted as guilty.

[13, 14] A mistrial is not lightly granted. The granting of the defendant's motion therefor rests largely in the discretion of the trial judge. State v. Ball, 280 N.C. 295, 185 S.E.2d 673; Strong, N.C. Index 2d, Criminal Law, § 138. We see no error in the denial of the motion in this instance.

[15] The court denied the defendant's challenge for cause to juror Frank Parker. The ground for challenge was that Mr. Parker, a member of the special venire, drawn and summoned after the regular panel was exhausted, had seen a television news report about the case the night before he was called into the jury box. Nothing whatever in the record suggests the nature of the television newscast so heard, nor does it appear that Mr. Parker had been summoned for jury duty prior to listening to the newscast. The defendant interrogated Mr. Parker at considerable length and no information was developed indicating any prejudice against the defendant, any preconceived idea concerning his guilt or innocence, or other ground for challenge. After the conclusion of the defendant's interrogation of this juror, the court interrogated him as follows:

"COURT: I'd like to ask him a question. In view of the fact you heard something on the television last night about the trial, and this is the time when the jury is being selected, no evidence has been presented, do you feel that you can sit and hear the evidence as it comes from the witness stand and give this defendant a fair and impartial trial without being influenced in any way by what you previously heard?

"A. Yes, sir, I could.

"COURT: Including what you heard last night on the television?

"A. Yes, sir."

There was no error in denying the defendant's challenge for cause to this juror. State v. Fox, 277 N.C. 1, 175 S.E.2d 561; State v. Hyde (Conrad), 274 N.C. 51, 161 S.E.2d 573.

Gwendolyn Blackmon, after testifying that the defendant, previously identified in court by her, kidnapped and raped her, testified that she saw him walk up to the car, with his knife, a white boy sitting in a "1971 Grand Prix, yellow with a cream vinyl top," parked in the parking lot of a launderette (identified by her as the launderette in Waxhaw). She further testified that, as a result, blood gushed from the mouth and nose of the boy and the defendant got in the boy's car and, after shoving his body over into the passenger seat, drove away. The boy so stabbed was a car salesman in appearance to that found with the body of David Timothy Parker as the boy in a roadside ditch some five miles from the launderette.

The Parker boy's brother testified that he, himself, was the owner of such an automobile and had lent it that afternoon to David Timothy Parker. This automobile was recovered that evening by police officers in Charlotte after the defendant, who was driving it had fled from it. It was heavily blood stained, not having borne such stains at the time the owner lent it to David Timothy Parker. The cause of the Parker boy's death was a stab wound in the chest.

[16, 17] Over objection, the brother of David Timothy Parker was permitted to testify that, when he borrowed the car and immediately before driving off in it, David Timothy Parker said he was going to the launderette in Waxhaw. The ground of

influenced in any way by what ...iously heard?

Yes, sir, I could.

RT: Including what you heard ...on the television?

Yes, sir."

...s no error in denying the de...hallenge for cause to this juror.

...fendant, positively identified in ... she saw him walk up to and ...his knife, a white boy, sitting in ...ind late yellow station wagon ...parked in the parking lot of a ...restaurant. By her testimony, she further identified ...result, Wood picked from the ...ber into the passenger's seat, ... The boy so picked were a ...ir appearance to that of defen... David Timothy Parker as it ...ared that night, nine rolls ...n Jarrette.

...er boy's brother testified that ..., was the owner of such an ...and had lent it that afternoon ...Timothy Parker. This witness ...covered that evening by police ...Charlotte after the defendant, ...ving it had fled from it. It ...y blood stained, not having ...stains at the time the owner ...David Timothy Parker. The ...Parker boy's death was a stab ...e chest.

Over objection, the brother of ...thy Parker was permitted to ...when he borrowed the car and ...before driving off in it. David ...ker said he was going to the ...in Washow. The ground of the defendant's objection was that this was hearsay evidence, which, of course, it is. It is, however, within an exception to the hearsay rule noted by us in State v. Vestal, 278 N.C. 561, 581-580, 180 S.E.2d 755. It was also admissible as part of the *res gestae* of the borrowing and departure. Vestal, 163 A.L.R. 15, 21. If it were not admissible under either of these exceptions to the hearsay rule, its admission would be, at most, harmless error. The only effect ...of the evidence would be to lend to identification testimony evidence of the way whereby the witness acquired. As above noted, the other evidence in the case established that fact beyond controversy. There is no ...ground for reversal.

Officer Griffin of the Charlotte Police ...Department testified that on 11 February ...1974 at approximately 9:40 p.m. he and ...another officer were cruising in a police ...vehicle on a report of a cab they had received. He observed the Parker automobile ...parked in the telephone booth at a ...service station. He [illegible] for the purpose of investigating the matter. ...[illegible] and at one point drove Patrol ...[illegible] the left side ...[illegible] turned into the path of the police car and struck it, then ...sped off.

Officer Griffin was seated in the passenger's seat of the police vehicle. Thus, he was immediately next to the driver of the other vehicle when the two cars were ...[illegible] and in collision. He testified that he had an opportunity to see the face of the driver of the other vehicle. The police ...vehicle continued the pursuit, bumping the ...[illegible] car several times in unsuccessful efforts to stop it. Finally, it slowed down and the driver jumped out and fled on foot. Officer Griffin pursued him on foot, drawing within ten feet of him. He unequivocally identified the defendant in court as the man who was driving the Parker car. To this evidence, there was no objection.

On cross-examination, Officer Griffin testified that he saw the defendant at a distance of about ten feet for four to five seconds while pursuing him on foot. There were street lights in the area. He then testified: "My identification of that subject as being the defendant is not based on my observation of that driver for four to five seconds. I am basing my identification on pictures that I saw of the suspect. My identification is not based strictly on what I saw that night." Thereupon, the defendant's counsel moved to strike the officer's in-court identification of the defendant and the court conducted a voir dire examination of the officer.

On such voir dire, the officer testified that his identification of the defendant as the man he so pursued in Charlotte on the night of February 11, 1974 was based upon what he saw that night as he and his companion were chasing the car, that he saw photographs of the defendant later, but his in-court identification of the defendant as the man he so pursued was based "only on ... [illegible] that night." He then described the appearance of the driver of the other vehicle as he saw him in the car and again identified the defendant as the man he that night. Upon this evidence, the court overruled the motion to strike. In this ruling we find no error.

[18, 19] Although the trial judge should have made specific findings of fact following the voir dire, his overruling of the motion to strike, under the circumstances, necessarily implies the finding that the in-court identification by the witness was based on what the witness saw in the course of the pursuit of the other vehicle and its driver. The evidence is ample to support such finding. Furthermore, there is nothing whatever in the record concerning the nature of the pictures he saw later, or to indicate that these, or the circumstances under which he saw them, were impermissibly suggestive. The in-court identification had an independent origin. There is nothing to indicate a substantial

likelihood of irreparable misidentification through the subsequent inspection of photographs. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; State v. Morris, 279 N.C. 477, 183 S.E.2d 634. Finally, as to this point, Officer Griffin's identification of the defendant, as the man he pursued, is corroborated by his finding of the defendant's coat on the ground at the point where the fleeing man jumped over a fence and thus escaped. It is further corroborated by the defendant's own statement to Sheriff Cooley, discussed below.

The next three assignments of error are directed to the admission of statements made by the defendant to the agents of the Federal Bureau of Investigation who arrested and interrogated him.

[20, 21] Agent Phelps of the Federal Bureau of Investigation, who arrested the defendant in Memphis, Tennessee, testified concerning both an oral statement and a written statement given by the defendant to the witness as the result of in-custody interrogation. Before admitting this evidence, the court conducted voir dire examinations and made full findings of fact. He found that, before each statement to F.B.I. agents containing the incriminating data the defendant was fully warned as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. He further found that the defendant signed a written waiver of his constitutional rights, including his right to have an attorney present at the interrogation, and that the defendant made the statements, oral and written, freely, voluntarily and intelligently. These findings, being fully supported by the evidence on the voir dire examination, are conclusive on appeal. State v. Fox, supra; State v. Gray, 292 N.C. 62, 79, 150 S.E.2d 1; State v. Barnes, 284 N.C. 547, 142 S.E.2d 344; State v. Rogers, 233 N.C. 390, 64 S.E.2d 572. An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. State v. Chance, 279 N.C. 643, 661, 185 S.E.2d 227; State v. Murry, 277 N.C. 197, 176 S.E.2d 738; State v. Gray, supra.

The defendant does not contend that the statements were not voluntary or that they were made without full knowledge of his constitutional rights. His contention is that it was error to permit Agent Phelps to read to the jury the written confession, consisting of five pages of detailed accounts of the defendant's activities from the abduction of Gwendolyn Patterson to the arrest of the defendant in Memphis, because it includes the defendant's statement: "[W]hile I was attending a I.C. Day in the General Assembly in Raleigh, North Carolina, at the Hilton Inn, I walked away." It is his contention that this "shows escape and previous commission" evidence of which would not be admissible.

As a matter of fact, the written confession also states that the defendant telephoned his mother in Los Angeles and told her he had "escaped from prison" and that he told the woman, in whose home he was arrested in Memphis, that he "had just gotten out of prison."

Agent Phelps also testified that, in his oral statement, the defendant "told us that on February 6, 1973 that while he was in Raleigh attending a Jaycee meeting he walked away from the prison that he was there." The defendant's contention on appeal is that this is also inadmissible evidence of his having committed some prior criminal offense. (At no time was there any evidence before the jury as to the nature of the prior offenses.)

Finally, in this connection, the defendant assigns as error the denial of his motion for a mistrial for the reason that Agent Phelps testified, "We asked Mr. Jarrett if he would relate to us details surrounding the time of his escape until the time [of] his arrest in Memphis[.]" Again, the contention of the defendant is that such testimony was inadmissible evidence to the effect that the defendant had committed previously some criminal offense. The ar-

nce, 279 N.C. 643, 661, 185 S.E.2d 22[illegible]; v. Murry, 277 N.C. 197, 176 S.E.2d State v. Gray, supra.

he defendant does not contend that the ments were not voluntary or that they made without full knowledge of his tutional rights. His contention is it was error to permit Agent Phelps to to the jury the written confession, ting of five pages of detailed account [illegible] of the defendant to Miranda [illegible] including the defendant's statement, [illegible] I was attending a Jaycee meeting in General Assembly in Raleigh, North Dan, at the Hilton Inn, I walked [illegible]." It is his contention that this [illegible] and prejudicial [illegible] ence of which could not be eradicated [illegible]

[illegible] plea [illegible] that the defendant telephoned his mother in Louisiana and told her [illegible] had "escaped from prison" and that [illegible] the woman, in whose home he was arrested, [illegible] that he "had just got out of prison."

[illegible] Phelps also testified that, in his [illegible], the defendant, who in their presence [illegible] that when he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." [illegible] that these statements [illegible] not be [illegible] [illegible] [illegible]

use of the word "escape," shows clearly that, had the defendant requested him to do so, the judge would have stricken from the written confession the above quoted words contained therein. Nothing in the record indicates that these particular expressions in the written document were called to the court's attention. The objection was to the introduction of the document in its entirety and the evidence on the voir dire examinations, conducted with reference both to the oral and to the written statements of the defendant to the officers, gave the court to understand that the defendant's objections were to the statements in their entirety and on the ground that they were involuntarily obtained, not to any specific words therein. "When testimony or a document is inadmissible only in part, the objection should specify the objectionable part, and if it is not so confined, it is not error to overrule it." Stansbury, North Carolina Evidence (2nd ed. Revised), § 27. In Nance v. Telegraph Co., 137 N.C. 313, 96 S.E. 888, this Court said, "Where a part of testimony is competent, although the other part of it may not be, and exception is taken to all of it, it will not be considered. * * * We will not set out the bad for him, and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part."

It will be observed that in these three assignments of error the defendant is not asserting that his constitutional rights have been denied or violated. He does not contend that the statements by him to the interrogating officers were involuntary, or that they were made without full knowledge of his constitutional rights. His contention is simply that, in these instances, evidence tending to show that he had previously committed some undisclosed criminal offense was improperly placed before the jury. Under the circumstances, these assignments are without merit.

As the Supreme Court of the United States said in Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavailable through limiting instructions, must occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593."

In Schmidt v. Florida, 405 U.S. 725, 92 S.Ct. 1565, 31 L.Ed.2d 972, the Court, after referring to the statement in the Bruton case, supra, said:

"There, unless there is a realistic possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. * * * In this case, we conclude that the 'mind of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Smith's confession been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In view of the detailed evidence given by defendant and the testimony of Gerald Blackburn, it is inconceivable that the jury never heard these objectionable statements relating to the defendant's having escaped prisoner, they would have rendered verdicts other than those which they did return.

Sheriff Fowler testified that after he returned the defendant to Union County, he also warned the defendant of his constitutional rights, in compliance with Miranda v. Arizona, supra, and the defendant signed another written waiver thereof, including his right to have counsel present the interrogation. Thereafter, the defendant made an oral statement which the Sheriff reduced to writing but the defendant did not sign. Upon objection being interposed, the court conducted another full voir dire examination and thereafter made full findings of fact, fully supported by the evidence on the voir dire examination, to the effect that such statement was made

voluntarily and intelligently, after the giving of the requisite warning concerning his constitutional rights. The court then overruled the objection to the testimony of the Sheriff concerning such statement. The Sheriff thereupon related to the jury the statement so given him by the defendant which included the following:

"I, Henry Jarrette, escaped from Odom Prison February 9, 1973. I, Jarrette, was at the Jaycee Ole in the General Assembly in Raleigh. I, Jarrette, escaped because of the prison conditions. After I escaped, I, Jarrette, went to Charlotte * * *."

Here, again, the objection was general and the defendant's motion to strike was directed to the entire statement. The testimony over the exceptions of Sheriff Fowler, prior to the introduction of this testimony, clearly indicates that the defendant's concern was directed to whether the statement was voluntary and made with knowledge of the defendant's constitutional rights. For the reasons above interred, this assignment of error also is without merit.

The court, in its charge to the jury, said:

"You may believe all that a witness says or you may believe none. You are to weigh the evidence and find where the truth lies * * *."

[25] The defendant assigns this as error, saying the court should have charged, "You may believe all, *or any part*, or none of what a witness says." (Emphasis added.) While the instruction suggested by the defendant would have been correct, and an improvement upon that actually given, we do not think the jury was misled by the omission of the words "or any part." This was a technical omission, not substantial, and could not have affected the result. Consequently, the defendant is not entitled to a new trial on account of it. State v. Leonard, 278 N.C. 42, 178 S.E.2d 577; State v. Lee, 277 N.C. 345, 176 S.E.2d 765; State v. Gatling, 275 N.C. 625, 170 S.E.2d 593. At the conclusion of its entire charge, the court asked counsel if any further instructions were requested. Both the Solicitor and counsel for the defendant replied in the negative.

[26] The record shows that the court, in its charge to the jury, said:

"If the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 9th day of February, 1973, the defendant, after having the hands of two eighteen-year-old girls carried her from Charlotte into Union County, and thereby her a hunting knife, that he took off her clothes and had sexual relations with her in the back seat of the car after placing her in the back seat by the use of force and without her consent and against her will, he would be guilty of rape."

The defendant assigns this as error, contending that under this instruction the jury might have found the defendant guilty of rape if the defendant put the girl in the back seat of the car by the use of force and without her consent and against her will, even though the act of intercourse was not with force and was with her consent. It will be observed that the insertion of commas before and after the phrase "after placing her in the back seat" makes the charge, on this point, completely accurate. The court reporter's punctuation of the judge's charge, standing alone, is not sufficient evidence of error to warrant a new trial. In the immediately preceding paragraph of the charge, the judge fully and accurately defined the crime of rape. It is not conceivable that the jury was misled by the above quoted portion of the charge.

[27] The defendant assigns as error the failure of the trial court to charge the jury that the defendant might be found guilty of assault with intent to commit rape or of assault on a female. There is no merit in this contention. These are

lesser offenses included in the offense of rape. However, it is not necessary for the court to submit to the jury a lesser, included offense, or to instruct the jury thereon, where there is no evidence tending to show the defendant may be guilty of such lesser offense. State v. Carnes, 279 N.C. 549, 184 S.E.2d 235; State v. Murry, supra; Strong, N.C.Index 3d, Criminal Law, § 115.

[29] All of the evidence, including the statements made by the defendant to the arresting officers in Memphis and to Sheriff Fowler, shows conclusively the act of sexual intercourse with the girl was conducted with threats to injure her if she made an outcry, and that panted, with her clothes pulled up back to a lonely spot on a rural road where the act of intercourse was committed. The girl's testimony was that at all times the defendant enticed her to her, or had at hand, the knife with which he subsequently stabbed the Parker boy to death. The defendant's own statements were to the effect that he told her that if she cooperated, he would not hurt her. There is no evidence whatever that she could escape through fear of serious injury. Under these circumstances, it was his error to fail to charge the jury concerning the lesser included offenses and to instruct them that on the charge of rape they might return a verdict of guilty of rape or a verdict of not guilty. State v. Bryant, 280 N.C. 224, 185 S.E.2d 111; State v. Carnes, supra; Strong, N.C.Index 2d, Criminal Law, § 115.

[29-31] There was likewise no error in the court's failure to submit to the jury the question of the defendant's guilt of second degree murder, and to instruct the jury thereon. All of the evidence, including the statements by the defendant to the arresting officers and to Sheriff Fowler, is to the effect that the defendant stabbed and killed David Timothy Parker for the purpose of stealing the automobile in which the Parker boy sat and in the accomplishment of that purpose. The larceny of the automobile under these circumstances was robbery. G.S. § 14-87. State v. Ball, 278 N.C. 80, 178 S.E.2d 593. A murder committed in the perpetration of a robbery is murder in the first degree. G.S. § 14-17. State v. Rich, 277 N.C. 333, 177 S.E.2d 422. The evidence, furthermore, shows clearly that the killing of the Parker boy was with premeditation and deliberation. There being no evidence whatever of any lesser degree of homicide, it was not error for the court to fail to instruct the jury concerning the lesser degrees of homicide and to instruct them that, under the charge of murder, they might return a verdict of guilty of murder in the first degree or a verdict of not guilty.

[32] The defendant's remaining assignments of error, relating to the denial of his motions for mistrial as to each of the charges, to misstatements of the court to the jury with respect to the law and procedures to be followed by the jury in the return of the judgments, have all been carefully examined, whether abandoned by the defendant in his brief or not. They present no merit whatever to any of them and would serve no useful purpose to discuss them individually. The verdicts of guilty of kidnapping, rape, murder in the first degree and armed robbery are each fully supported by the evidence. The record shows that the defendant received, on each charge, a fair trial in accordance with the law of this State. The record discloses no basis for disturbing any of the verdicts or the granting of a new trial upon any of the four charges.

We are thus brought to the defendant's principal contention, the sole contention upon the ancient curiae, that even though the defendant received a fair trial, free from error, and, consequently, stands properly convicted of murder in the first degree and of rape, it was error to enter judgments on these charges sentencing him to death, and so, in Case No. 73CR1312 (murder) and Case No. 73CR1349 (rape), the judgments entered should be vacated and the cases remanded for judgments sentencing the defendant to imprisonment for life.

murder under these circumstances was ...ery. G.S. § 14-87; State v. Bailey, ... N.C. 99, 173 S.E.2d 569. A murder ...mitted in the perpetration of a robbery ...urder in the first degree. G.S. § 14- ... State v. Fish, 277 N.C. 433, 177 S.E. ...2d 22. The evidence, furthermore, shows ...ly that the killing of the Parker boy ... with premeditation and deliberation. ...e have no evidence whatever of a ...r degree of homicide. It was not error ... the court to fail to instruct the jury ... ...

...

It will be noted that this assignment of error has no relation to the judgment imposing a sentence to imprisonment for life in Case No. 73CR3843 (kidnapping). It will also be noted that in Case No. 73CR1341 (armed robbery) prayer for judgment was continued, this offense having been used by the State as an element of the crime of murder in the first degree.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, in a matter of discretion, to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. Each of the nine Justices, five concurring in the decision and four dissenting therefrom, wrote a separate opinion. The five Justices concurring in the decision did not agree, among themselves, as to the basis upon which the decision rests.

It is neither the function nor the purpose of this Court to defend or justify Furman, the stated reasons for it or the results which have flowed from it. Our function and most has been, and is, to comply with it and to determine its effect upon the statutes of North Carolina, which expressly provide what penalty is to be imposed upon a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson. G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58.

Pursuant to Furman, we have received from the Supreme Court of the United States, and have complied with, mandates to vacate sentences of death affirmed by us prior to that decision. State v. Frazier, 283 N.C. 99, 195 S.E.2d 33; State v. Miller, 281 N.C. 730, 190 S.E.2d 311; State v. Hamby and Chandler, 281 N.C. 743, 191 S.E.2d 66; State v. Chance, supra; State v. Westbrook, supra; State v. Dees, 281 N.C. 751, 191 S.E.2d 70. In other cases, reaching this Court after the decision in Furman, involving offenses committed prior to our decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, we have, in conformity thereto, vacated death sentences, and, having found no error in the trial, remanded the matters to the Superior Courts for the imposition of sentences to life imprisonment. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431; State v. Watkins, 283 N.C. 391, 196 S.E.2d 759; State v. Waddell, supra; State v. Carroll, 282 N.C. 326, 193 S.E.2d 85. See also: State v. Gurley, 285 N.C. 241, 204 S.E.2d 7[illegible]; State v. Worthington, 283 N.C. 475, 196 S.E.2d 831; State v. Tilbert, 282 N.C. 718, 194 S.E.2d 822.

Prior to 1949, the imposition of a sentence to death was mandatory, in this State, upon a conviction of first degree murder or rape. In 1949, the Legislature inserted a proviso in the statutes relating to the punishment for first degree murder and rape, similar provisions having been inserted earlier into the statutes relating to first degree burglary and arson. As so amended, G.S. § 14-17 (relating to murder), at the time of Furman, read:

> "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the prisoner shall be imprisoned for life in the State's prison, and the court shall so instruct the jury."

G.S. § 14-21 (relating to rape), as so amended, was to the same effect, so far as punishment is concerned.

At the time Furman v. Georgia, supra, was decided, this Court had held in numerous decisions that the effect of the provisos inserted into these statutes by the 1949 amendment, and the effect of the like provisos previously inserted in G.S. § 14-52 (burglary) and G.S. § 14-58 (arson),

was to confer upon the jury in each case the absolute, "unbridled" discretion to fix the punishment at either death or imprisonment for life. State v. Manning, 251 N.C. 1, 110 S.E.2d 474; State v. Denny, 249 N.C. 113, 105 S.E.2d 446; State v. Conner, 241 N.C. 468, 85 S.E.2d 881; State v. Summons, 234 N.C. 293, 66 S.E.2d 897; State v. McMillan, 233 N.C. 630, 65 S.E.2d 212; State v. Shackleford, 232 N.C. 509, 59 S.E.2d 825; State v. Mathis, 230 N.C. 508, 53 S.E.2d 669. This, Furman held, the State may not do by reason of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The question was therefore presented, as a result of Furman v. Georgia, supra, What part of G.S. § 14-17 (murder) and what part of G.S. § 14-21 (rape), if any, remains the law of North Carolina? That question came before this Court and was determined by us in State v. Waddell, supra.

While the decision in State v. Waddell, supra, was not unanimous, no member of this Court held the view that Furman invalidated G.S. § 14-17 or G.S. § 14-21 in its entirety. All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death mandatory per force, or the provision added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman. It was the view of the majority of this Court that the portion of each of these statutes which survived Furman, and remained the law of North Carolina, was the original provision making the death penalty mandatory and State v. Waddell, supra, so decided. The Supreme Court of Delaware reached the same conclusion as to the effect of Furman v. Georgia, supra, upon the similar statutes of that State. State v. Dickerson (Del.), 298 A.2d 761.

To avoid another, and different, serious question of constitutional validity, should we give State v. Waddell, supra, retroactive effect, we there held that our decision would not be retroactive and that, consequently, the death penalty would be imposed only in cases where the offense was committed after the date of that decision (18 January 1973). To the same effect see State v. Dickerson, supra.

[33] The reasons for our decision in State v. Waddell, supra, are full, set forth in the opinion there in and [illegible] counsel here. Having given full consideration to the brief and oral argument of defendant and to the brief of the amicus curiae, requesting us to reconsider State v. Waddell, supra, we now reaffirm that decision and hold that the mandatory of G.S. 14-17, G.S. § 14-21, G.S. § 15-52, and G.S. § 14-58, in the light of the decisions of the Supreme Court of the United States in Furman v. Georgia, supra, is that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the trial judge having no discretion in the matter of the punishment to be imposed and the jury having no authority to render a different penalty verdict.

[34] The determination of what if any statutes of this State remain with reference to the punishment to be imposed for criminal offenses is a question of State law, the determination thereof by this Court authoritative. It is not a Federal question. Adderly v. Florida, 385 U.S. 39, 17 L.Ed.2d 149, reh. den. 385 U.S. 1050, 87 S.Ct. 698, 17 L.Ed.2d 579; Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 282, 15 L.Ed.2d 176.

Having determined that the defendant has been lawfully and truly convicted of first degree murder and of rape and having determined that G.S. § 14-17 and G.S. § 14-21 require a defendant so convicted to be sentenced to death, the question then becomes whether the imposition of such sen-

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tence in this case violates any provision of the Constitution of North Carolina or of the Constitution of the United States.

[35] The Constitution of North Carolina, Article XI, §§ 1 and 2, expressly permits the imposition of the death penalty upon conviction of first degree murder or upon the conviction of rape. The meaning of the State Constitution is also a matter of State law upon which the decision of the Court is final.

The contention of the defendant and of the amicus curiae is that a State statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

[36] Furman v. Georgia, supra, does not so hold, only two of the nine Justices (Mr. Justice Brennan and Mr. Justice Marshall) subscribing such a view in their opinions in that case. No other decision of the Supreme Court of the United States so holds. This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must decide in the light of decisions heretofore rendered by that Court.

The arguments of the defendant and of the amicus curiae, in support of their position on this question, may be summarized as follows: (1) Although G.S. § 14-17 (murder) and G.S. § 14-21 (rape), as construed in State v. Waddell, supra, make the imposition of the death sentence mandatory upon conviction of first degree murder or rape, the death penalty is nevertheless discretionary and selective because (a) the Solicitor has the power to prosecute for a lesser charge, (b) the jury has the power to acquit or to convict of a lesser charge, and (c) the Governor has the power to commute the sentence or grant a pardon; (2) since our decision in State v. Waddell, supra, the death sentence has been imposed in North Carolina more frequently than was the case prior to the decision in Furman v. Georgia, supra, from which it is concluded that our construction of these statutes is contrary to the legislative intent; (3) nevertheless, since State v. Waddell, supra, was decided, the death penalty has been imposed in such a small number of cases that its imposition is clearly selective and arbitrary; (4) the defendants sentenced to death since State v. Waddell, supra, was decided are predominately non-white; (5) death is a cruel and unusual punishment because an "enlightened" public opinion has now scholarly repudiated it; (6) the punishment of death is both cruel and futile.

Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the arguments with which they are advanced impels us to take note of each of them briefly.

(1) The Death Penalty Is Discretionary And Selective.

As is true of any other crime, if, after a murder case or a rape case begins with someone notifying police officers that the offense has occurred, as the result of ensuing police investigation, the person charged is arrested and, in due time, the matter comes to the attention of the Solicitor. It is his duty to evaluate the information and determine whether to seek an indictment and, if so, for what offense. It is not the Solicitor's duty to seek the indictment or the conviction of the innocent, or to seek the conviction of a person, guilty of one crime, upon another and more serious charge of which he is not guilty. It is elementary and fundamental that a defendant is not to be convicted unless his guilt is established beyond a reasonable doubt. The decision of the Solicitor as to the offense for which he will seek an indictment from the grand jury and his decision as to whether to accept, with the permission of the court, a plea to a lesser charge, includ-

ed within the offense specified in the indictment returned, are the results of an evaluation of the available evidence, including its credibility. The Solicitor's decision to charge a defendant with a crime, punishable by death if he is convicted, is a solemn one, properly reached only when, in the Solicitor's judgment, the evidence of guilt is clear and convincing. This is a human evaluation. There is often room for difference of opinion concerning it. To say, as does the brief of the amicus curiae, that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decisions to seek convictions on capital charges in other cases are "unskilful" is a patent absurdity, unjust to the skilful and honorable attorneys who hold and have held the high office of Solicitor in this State.

The purpose of vesting the power of indictment in an officer is to enable him to make different decisions in different cases in the light of what he determines to be materially different factual situations. All governmental action rests upon this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States does not require a state, in the enforcement of its criminal laws, to hedge its prosecuting attorney about with "guidelines" that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the discretion now complained of by the amicus curiae, has been vested in prosecuting officers throughout the country. Without it, the grossest injustices would necessarily be inflicted upon innocent persons accused of crime.

The suggestion, by the amicus curiae that the death penalty is unconstitutional because in many cases, in which the prosecuting attorney seeks the death penalty, the jury acquits the defendant altogether or convicts him of a lesser, included offense, has, if possible, even less plausibility. Article I, § 24, of the Constitution of North Carolina requires a trial by jury in all such cases. The Sixth Amendment to the Constitution of the United States contains a like provision. Obviously, the possibility of different verdicts by different juries in different cases upon different evidence was not believed by the framers of these constitutional provisions to be a sound reason for denying a state the power to impose an otherwise lawful penalty upon one found guilty by the jury which tried him, he having had a fair trial in accordance with the applicable law. State v. Vestal, State v. Hair, supra, 271 N.C. at p. 157 S.E.2d 335.

It is quite true that Article III, § 2, of the Constitution of North Carolina gives to the Governor of the State the power to commute a death sentence imposed upon any defendant or to grant such defendant an absolute pardon, or to refuse to disturb such sentence imposed upon a different defendant. Article II, § 2, of the Constitution of the United States confers a like power upon the President. So far as we have been able to determine, a like power is vested in the governor or some other officer of any State or Dependency, in each of our states such power has existed and has been exercised repeatedly by the Governors of the state and by the President of the United States from the birth of our country to its existence and frequent exercise despite the imposition of the death penalty as constitutional per se, the late Justices of the Supreme Court of the United States discussed a great deal of thought and research in Furman v. Georgia, supra. Nonetheless as suggested in that case,

We reject categorically the contention of the amicus curiae that "the inevitable result of the North Carolina system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death." The Governor exercises his judgment after investigation of the record of the trial and other circumstances, including subsequently discovered evidence. This Court reviews the rec-

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reject categorically the contention of nicus curiae that the inevitable re- of the North Carolina system of con- ion is that an arbitrarily selected er of those convicted of like crimes be put to death." The Governor ises his judgment after investigation record of the trial and other circum- es, including subsequently discovered nce. This Court reviews the rulings of the trial judge. The Governor reviews the decision of the jury, which we may not do. The exercise by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another Governor might, theoretically, have reached opposite conclusions.

[37] The Equal Protection Clause of the Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment. The Due Process Clause of that amendment protects liberty as well as life. The discretion in the Solicitor, in the jury and in the Governor, of which the amicus curiae complains, extends also to non-capital crimes. If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, however long or short. Quite obviously, this is not the kind of question which the Supreme Court of the United States held appropriate in Furman v. Georgia, supra.

(2) The Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows That Juries Are Unwilling To The Intent Of The Legislature.

[38, 39] The statement has to reference to the constitutionality of the death penalty. The decision in State v. Waddell, supra, was announced 18 January 1963. It was well publicized. Bills were promptly introduced in the 1973 Session of the Legislature to circumvent it and to abolish the death penalty. Obviously, this was within the authority of the Legislature. North Carolina Constitution, Article XI, § 2. These bills failed to pass. This is a clearer indication of the intent of the Legislature than is a statistical comparison of death sentences imposed per year prior to Furman v. Georgia, supra, and subsequent to State v. Waddell, supra.

It is but natural that more death sentences per year will be imposed under a mandatory statute than under one giving the jury discretion as to the penalty. While the 1973 Session of the Legislature did not have before it statistics now available, it could hardly have supposed that the number of death sentences would not increase, at least until the fact that the death penalty is the lawful punishment in North Carolina for first degree murder, rape, first degree burglary and arson becomes known to those inclined to commit such offenses.

It is also perfectly obvious that it was the hope of the 1973 Session of the Legislature to reduce the number of death sentences imposed for murder and rape. Unfortunately, the statutory device which it adopted to effectuate such intent was held by the Supreme Court of the United States to be beyond the power of the Legislature. Furman v. Georgia, supra. By that determination, we are bound.

(3) The Small Number Of Death Sentences Imposed Since State v. Waddell, Supra, Makes The Death Penalty To Be Imposed Arbitrarily.

Having first contended that too many have been sentenced to death since State v. Waddell, supra, the amicus curiae here contends that the number is too small. State v. Waddell, supra, held the death penalty could be imposed only for (1) murder in the first degree, G.S. § 14-17; (2) rape, G.S. § 14-21; (3) first degree burglary, G.S. § 14-52; (4) first degree arson, G.S. § 14-58 (arson only for offenses committed after 14 January 1973. There is, to avoid why, some thing but between the commission of an offense and the trial and sentencing of the offender.

As of 14 January 1974, virtually one complete year since our decision in State v. Waddell, supra, twenty-one persons, including the present appellant, have been sentenced to death in North Carolina for crimes committed after the decision was announced, three being codefendants charged with the rape of the same victim.

The present appellant was the first person so to be sentenced and his is the first appeal from those so sentenced to reach this Court. It has, therefore, not yet been finally determined whether any or all of the remainder were tried and sentenced pursuant to law. Of all the twenty-one, thirteen were convicted of first degree murder only, one (the defendant) was convicted of first degree murder and of rape, five were convicted of rape only, one of first degree burglary only and one of first degree burglary and of rape.

We are not advised by the defendant or by the brief of the amicus curiae as to how many individuals were brought to trial in North Carolina during this twelve-month period on capital charges and no statistics on that matter are available to us. Consequently, we do not have before us the number acquitted or the number convicted of lesser, included offenses. If we had such statistical data, it would neither establish nor disprove the contention that the twenty-one sentenced to death were arbitrarily selected. Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts. What we do know is that all defendants *convicted* of first degree murder or of rape, committed since 18 January 1973, have been sentenced to death. The contention of arbitrariness is, therefore, not established.

(4) *Those Sentenced To Death Since State v. Waddell, Supra, Are Predominantly Non-White.*

The present record is completely silent as to the racial composition of the grand jury which indicted this defendant and the petit jury which found him guilty. We are quite certain that had there been no members of the defendant's race thereon, or had there been the slightest suggestion otherwise of racial discrimination in the selection of either the grand or the petit jury, the defendant and the amicus curiae would not have left us in ignorance thereof. We do know from our own repeated investigation and study of the matter in other cases in recent years that there is no substantial or widespread racial discrimination in the selection of grand or petit jurors in this State. Consequently, we cannot predicate a conclusion that North Carolina juries are, or in recent years have been, more inclined to convict guilty Negroes than guilty white defendants, of crimes for which the death penalty is imposed, on the basis of an assertion to that effect by "enlightened opponents of the death penalty and a statistical tabulation of convictions classified by race.

Five of the twenty-one individuals sentenced to death in the twelve months since *State v. Waddell, supra*, were nonwhite, one is an Indian and fifteen are Negroes. Of the five white men, three were convicted of murder in the first degree, one of burglary in the first degree and of rape and one of rape only. All appeals have not been heard. As above shown we have nothing before us or available to us to show how many white defendants or how many Negro defendants charged with the commission of a capital offense during this twelve-month period were brought to trial and acquitted or convicted of a lesser, included offense.

Courts can deal only with matters brought before them on charges of criminal acts. Neither the defendant nor the amicus curiae shows or even suggests that the police officers of North Carolina have discriminated between white and Negro individuals so charged in the matter of arrest or investigation. We know of no provision in the Constitution of the United States which requires police officers, having arrested a Negro rapist or murderer, to arrest no more Negroes so charged until a quota of white murderers and rapists, proportionate to the racial distribution of the population, has been so charged and arrested. Nor are we aware of any provision in the Constitution which requires prosecuting

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attorneys to defer bringing defendants of one race to trial until members of the other race have been tried for such offenses in proportion to the respective racial population in the area. The experience of this twelve-month period demonstrates clearly that North Carolina juries can and will convict white defendants of capital crimes and North Carolina judges will sentence them to death upon such conviction.

The record of this Court establishes beyond question that such sentences have been, and will be, affirmed when the defendant has had a fair trial in accordance with law. In the seven years the writer of this opinion had been a member of this Court prior to Furman v. Georgia, supra, there were before it appeals by twenty-six defendants sentenced to death. Sixteen were Negroes, nine were white and one was an Indian. One was a woman. Ten of the twenty-six were granted new trials by this Court, apart from any action of the Supreme Court of the United States. Of those ten, eight were Negroes and two were white. Thus, of the sixteen death sentences, affirmed by this Court in the seven years prior to Furman v. Georgia, supra, eight were imposed upon Negro defendants, seven upon white defendants and one upon an Indian. In those cases each record was carefully reviewed by each member of this Court, over and beyond the review required by the formal assignments of error, just as has been done in the present case. In each of those cases, as in the present case, the record revealed a cruel, brutal murder or rape, or both, with no extenuating circumstance. Nothing whatsoever in the record of any of those cases, or in the record of this case, offers the slightest justification for the statement, or the suspicion, that the juries of this State have been affected by the race of the defendant in their determination that those defendants, or the present defendant, should be executed. Nothing whatsoever in those records, or in the present record, justifies the suggestion, or the suspicion, that the death sentence in any of those cases, or in this one, was "freakishly" imposed or "freakishly" affirmed.

(5) *Death Is A Cruel And Unusual Punishment Because An "Enlightened" Public Opinion Has Overwhelmingly Repudiated It.*

The brief of the amicus curiae does not define its term, "enlightened." The implication, reasonably drawn from it, is that an "enlightened" person is one who opposes the death penalty. Only on this hypothesis can the statement that "enlightened" public opinion has repudiated the death penalty be found true.

Since Furman v. Georgia, supra, was decided on 29 June 1972, according to the brief of the amicus curiae, twenty states, scattered over the entire country, have reinstated capital punishment by legislation. In addition to our own decision in State v. Waddell, supra, Delaware has retained the death penalty by judicial decision, holding its "Mercy Statute" severable from its earlier "Murder Statute." State v. Dickerson, supra. Thus, there are now twenty-two states which have made some provision, since Furman, to inflict the death penalty for one or more offenses.

According to the dissenting opinion of Mr. Justice Powell in Furman v. Georgia, supra, 408 U.S. at p. 417, 92 S.Ct. 2727, 33 L.Ed.2d 346, approximately six hundred individuals were in state and Federal prisons, throughout the country, under sentence of death at the time Furman was decided. Many others, including six in North Carolina (one under two death sentences) had had their death sentences reduced to life imprisonment just a short time earlier, by virtue of the decisions of the Supreme Court of the United States in United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138, and Pope v. United States, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317. (See: State v. Childs, 280 N.C. 576, 187 S.E.2d 78; State v. Pusebore, 279 N.C. 391, 183 S.E.2d 104; State v. Sanders, 279 N.C. 389, 183 S.E.2d 107; State v. Williams, 279 N.C. 388, 183

S.E.2d 106; State v. Atkinson, 279 N.C. 326, 183 S.E.2d 106; State v. Atkinson, 279 N.C. 385, 183 S.E.2d 105; State v. Hill, 279 N.C. 371, 183 S.E.2d 97.) As above noted, twenty-one have received sentences of death in this State since 18 January 1973.

The present record shows that fifty prospective jurors were examined by the State. Of these, five were challenged by the State for cause, due to their expressed unwillingness to return a verdict which would necessitate the imposition of the death penalty under any circumstances. Seven others were challenged peremptorily by the State. Assuming that all of these peremptory challenges were due to the Solicitor's misgivings concerning the views of the prospective jurors as to the death penalty, this record shows that only twenty-four per cent of those called for jury service in this case, in Union County, believed that in no case should the death penalty be imposed.

It is thus quite clear, both throughout North Carolina and throughout the nation, that there is widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the amicus curiae that this widespread opinion, held by legislators, judges and jurors, is "unenlightened."

(6) The Punishment Of Death Is Both Cruel And Futile.

The severity of the death penalty is obvious. For that reason, it has been, and should be, imposed only for the most serious crimes and only when the defendant's guilt of such an offense has been established beyond reasonable doubt.

The amicus curiae contends that to inflict the death penalty for any crime is futile because such penalty is not the most effective means for obtaining the goals of criminal punishment which it says are: (1) Retribution, (2) moral reinforcement or reprobation, (3) isolation of the offender, (4) reformation and rehabilitation the offender, and (5) deterrence.

[40] Like Mr. Justice Stewart, in his opinion in Furman v. Georgia, supra, 408 U.S. at p. 308, 92 S.Ct. at p. 2761, we "do not agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." The reasonable certainty, or even likelihood of a punishment commensurate with the offence, imposed by the State, is more likely to deter prospective offenders by the family and friends of the victim to "balance the account," than it is a society of correction designed to release the offender in society as soon as possible.

The amicus curiae acknowledges that "moral reinforcement or reprobation" doubtless requires that the most serious crimes be punished most severely." If so, the death penalty is not futile so far as the attainment of this goal is concerned.

"Isolation of the offender" apparently means prevention of further crime by him. The death penalty is certainly not futile to the attainment of this objective.

Reformation and rehabilitation of the offender is obviously cut off by his execution. The present defendant, however, is not a promising prospect for rehabilitation by lawful punishment of any sort. Before going to trial, he was committed to one of the State hospitals for the insane for the purpose of an examination into his sanity. He was returned for trial with the report, "Without Psychosis (Not Insane)." This evaluation of his mind is not challenged. It is not contended by the appellant or by the amicus curiae that this defendant is lacking in intelligence. Prior to the offenses with which we are now concerned, the defendant was convicted of the murders of two other persons by stabbing them. For these offenses he was imprisoned for a term of years. While serving that sentence, he was permitted to join a national civic society, the Junior Chamber of Commerce, and became the president of a chapter of this society organized within the prison. He was permitted to leave the

...4) reformation and rehabilitation of ...ffender, and (5) deterrence.

...] Like Mr. Justice Stewart, in his ...on in Furman v. Georgia, supra, 408 ...at p. 308, 92 S.Ct. at p. 2761, we "can...gree that retribution is a constitution...mpermissible ingredient in the imposi... of punishment." The reasonable cer..., or even likelihood of a punishment ...ortionate with the offense, imposed by ...State, is more likely to deter private ... to the fruits and spoils of the vic... "than the prospect," vain as a gal... of conviction if urged to relax the ... for its society as soon as possible.

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Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with carefully organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide.

Through recent years, the efforts of North Carolina actually to impose capital punishment in the most flagrant instances of vicious crime have been blocked by mandates of the Supreme Court of the United States stemming from Furman v. Georgia, supra, United States v. Jackson, supra, and Pope v. United States, supra. We, therefore, do not have recent experience which would support or disprove the contention of the amicus curiae that the carrying out of the death sentence in this instance would be less effective than imprisonment as a means of deterring others from like acts.

[41, 42] It is not, however, the function of this Court to determine the most efficacious punishment for the crimes of murder in the first degree and of rape. That is the function of the Legislature. Nothing in the Constitution of the United States requires that the Legislature prescribe the most efficacious punishment for crime, or even the one favored by "enlightened" sociologists. It is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the achievement of the goals of all criminal punishment. In our opinion, G.S. § 14-17 and G.S. § 14-21, as construed by us in State v. Waddell, supra, meet this constitutional standard.

[43] We, therefore, reject the contentions of the defendant and of the amicus curiae that the imposition of the death penalty for the crimes of first degree murder and rape is, per se, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

No error.

BOBBITT, Chief Justice, with whom HIGGINS and SHARP, Justices, join, dissenting as to death sentences.

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19, was decided 18 January 1973. All members of this Court agreed, as stated in the majority opinion, that "the Furman decision [Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, decided 29 June 1972] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." 282 N.C. at 439, 194 S.E.2d at 25. Waddell's death sentence was vacated and his case remanded to the superior court for a judgment of life imprisonment.

All of us agreed that *Furman* required this disposition of Waddell's case. However, the majority opinion stated that for crimes of first degree murder, rape, first degree burglary, and arson, committed after 18 January 1973, the date of the *Waddell* decision, punishment by death would be mandatory. In accord with that statement, the majority sustain the death sentences herein. Three of us dissented in *Waddell* and now dissent from that view of the law. We were and are of the opinion that the impact of *Furman* upon our statutes is to prohibit and to require or permit *the imposition of death sentences until such time as our statutes are enacted by the General Assembly.*

The statutes enacted by our General Assembly provide that a person convicted of first degree murder, G.S. § 14-17, or of rape, G.S. § 14-21, or of first degree burglary, G.S. § 14-52, or of arson, G.S. § 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison. These statutes were rewritten as now codified by Chapter 208, Session Laws of 1949. The 1949 Act provided: "This Act shall be in full force and effect from and after its ratification, *but excepting trials for offenses committed prior to its ratification.*" (Italics added.) The application of the 1949 Act to offenses committed prior to its ratification is further indication of the General Assembly's intent that punishment by death was not to be imposed unless the jury was given the discretion to recommend that punishment be life imprisonment and failed to make such recommendation. No changes have been made *by the General Assembly* in any of the provisions of G.S. § 14-17, G.S. § 14-21, G.S. § 14-52, and G.S. § 14-58, since the 1949 Act.

The majority (4) were of the opinion that the impact of *Furman* was to invalidate the proviso in each of these statutes; and that, upon invalidation of the proviso, the remaining portion provided unconditionally for punishment by death. The minority (3) were of the opinion that the impact of *Furman* was to invalidate *the death penalty provision* of these statutes; and that, unless and until the statutes are amended *by the General Assembly*, the punishment for each of these crimes is life imprisonment.

In *Waddell*, I expressed my dissenting views in these words: "I do not think a *death sentence* may be constitutionally inflicted unless our *General Assembly* retains from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This court has no right to repeal them." *State v. Waddell*, *supra*, at 154, 194 S.E.2d at 31.

In *Waddell*, I reviewed court decisions of Ohio, Mississippi, Louisiana, Oklahoma, Illinois, Pennsylvania, Arkansas, Washington, Virginia, Florida and Texas, relating to the impact of *Furman* upon statutes of those states containing essentially the same provisions as our G.S. § 14-17, G.S. § 14-21, G.S. § 14-52 and G.S. § 14-58. Each interpreted *Furman* as holding that the death sentence could be imposed as to [illegible] the statutes) of that state contained provisions which left to the unbridled discretion of a judge or jury whether the punishment would be death or life imprisonment. Later, decisions to the same effect were handed down in Alabama [Hubbard v. State, 290 Ala. 118, 274 So.2d 248 (1973)]; Arizona [State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973)]; Kansas [State v. Randol, 212 Kan. 461, 513 P.2d 216 (1973)]; Maryland [Bartholomey v. State, 267 Md. 175, 297 A.2d 696 (1972)]; Massachusetts [Commonwealth v. A Juvenile, 360 N.E.2d 439 (1973)]; New York [People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d

fly for punishment by death. The ma-
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294 S.E.2d at 41.

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[State v. Enlow, 107 Ariz. 117,
P.2d 248 (1971)]; Kansas [State v.
d, 212 Kan. 461, 513 P.2d 248
)]; Maryland [Huthleberry v. State,
d. 178, 296 A.2d 619 (1972)]; Massa-
tts [Commonwealth v. A Juvenile, 359
E.2d 439 (1973)]; New York [People v.
atrick, 32 N.Y.2d 987, 346 N.Y.S.2d
703, 300 N.E.2d 139 (1973)]; South Caro-
ina [State v. Gibson, S. C., 192 S.E.2d 720
(1972)]; Tennessee [Hunter v. State,
Tenn., 496 S.W.2d 900 (1972)].

The majority opinions in *Waddell* and in the present case cite State v. Dickerson, Del.Supr., 268 A.2d 701, the only decision which supports to any extent the views of the majority. I now add to the discussion of *Dickerson* in my dissenting opinion in *Waddell* the following: Further research reveals a comprehensive revision of Title 11, Parts I and II, of the Delaware Code, was approved by the General Assembly of Delaware on 6 July 1972 and became effective 1 April 1973. 58 Delaware Laws, chapter 436. The portion of this revision codified as Section 4209 sets forth in detail a new procedure for determining whether the punishment is to be death or life imprisonment upon a plea or conviction of guilty of murder in the first degree committed on or after 1 April 1973. *Dickerson* was decided 1 November 1972. The statutes to which it relates became obsolete on 1 April 1973. *Dickerson* held that first degree murders committed in Delaware during the five (5) months between 1 November 1972 and 1 April 1973 were punishable by death. My research indicates there has been no decision of the Supreme Court of Delaware since *Furman* which sustains a death sentence. Apparently, the four-to-three decision in this case is the only decision since *Furman* which sustains a death sentence under statutory provisions similar to ours.

The majority opinion in the present case states: "All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman." These sentences do not accurately state the views of the minority. In our view, the provisions of these statutes embody an indivisible and unified plan for punishment of the felonies referred to therein. *Furman* did not purport to delete, isolate or invalidate any particular portion of the statute. *Furman* simply held that the death penalty provision under the statutes as now constituted is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

On authority of *Furman*, the Supreme Court of the United States vacated the death sentences which this Court had sustained in the *Miller, Waddy and Cherdon, Chance, Westbrook* and *Boss* cases; and, pursuant to the mandate of the Supreme Court of the United States, this Court remanded these cases for judgments imposing sentences of life imprisonment. For citations, *see* State v. Waddell, *supra*, 282 N.C. at 453, 194 S.E.2d at 30-31. *Furman* did not reinstate death as the only permissible punishment for murder in the first degree, rape, burglary in the first degree and arson.

The majority opinion responds to the portions of the briefs of defendant and of the amicus curiae which urge this Court to do what the Supreme Court of the United States refused to do in *Furman*, that is, to hold that punishment by death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Being of the opinion that, for the reasons stated herein, the death sentences must be vacated and the cases remanded for judgments of life imprisonment, I refrain from discussing these matters otherwise than by repeating this statement from my dissenting opinion in *Waddell*, viz: "I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision

would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination." 282 N.C. at 473, 194 S.E. 2d at 43.

Since the provisions of G.S. § 14-17 (murder in the first degree) and G.S. § 14-21 (rape) are now the same as when *Furman* was decided, I think the only [illegible] is to vacate each of the death sentences and to remand the cases for the pronouncement of judgments of life imprisonment.

SHARP, Justice, concurring further in the dissenting opinion of Chief Justice BOBBITT.

To Chief Justice BOBBITT's exegetical interpretation of the effect of the *Furman* decision upon our statutes which have specified the punishment for first-degree murder, rape, first-degree burglary, and arson, I can add nothing. He has expressed my views exactly. However, I make the following comments:

In my view the death sentence is not constitutionally impermissible as cruel and unusual punishment for first-degree murder and rape. The question of capital punishment, however, is one of momentous public policy to be determined by the legislature. It is not for this Court to declare either by unanimous decision or four-three division.

In 1949 the legislature, in effect, made the punishment for first-degree murder, rape, first-degree burglary, and arson death or life imprisonment as the jury, in its discretion, might determine. In 1972 the *Furman* decision wrecked that plan by outlawing the imposition of the death penalty under any statute which permitted either judge or jury to impose it as a matter of discretion. On 18 January 1973 this Court, in the four-three *Waddell* decision, completed the destruction of the legislative plan by making the death sentence mandatory for the four crimes when committed after that date. Since these two decisions the legislature has [illegible] rewritten the affected statutes. Surely it is time for the General Assembly to exercise its constitutional legislative prerogative. N.C.Const. art. I, § 6 declares, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

STATE of North Carolina

v.

Tommy NOELL.

No. 10.

Supreme Court of North Carolina.

Feb. 25, 1974.

Defendant was convicted in the Superior Court, Orange County, Clarence Hall, J., of rape, and he appealed. The Supreme Court, Moore, J., held that excusing for cause of jurors who stated that it would be impossible for them to bring in a verdict of guilty was not improper; it was also held that challenge of all Negroes by solicitor did not establish arbitrary and systematic exclusion of Negroes; it was also held that argument of solicitor was not improper, and that death sentence was not unauthorized or cruel and unusual punishment.

No error.

Higgins, J., dissented as to death sentence in an opinion.

1. Jury ⊂=35

Decisions as to a juror's competency to serve rests in trial judge's sound discretion.

by making the death sentence manda-
for the four crimes when committed
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ome judicial powers of the State gov-
ment shall be forever separate and dis-
from each other."

STATE of North Carolina

v.

Tommy NOELL

No. 10.

Supreme Court of North Carolina.

Feb. 28, 1979.

Defendant was convicted in the Superior Court, Halifax County, Clarence W. [illegible], of first degree rape, and he appealed. The Supreme Court, Exum, J., held that: (1) trial judge's rulings on questions as to competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law; (2) three prospective jurors who stated unequivocally that they could not find defendant guilty even though State convinced them beyond a reasonable doubt of his guilt were not impartial jurors and were properly excused for cause; (3) although a defendant has the right to be tried by jury from which members of his own race have not been systematically and arbitrarily excluded, a defendant does not have a right to be tried by a jury containing members of his own race or even to have a representative of his own race serve on the jury; (4) burden is upon defendant challenging racial composition of jury to establish racial discrimination in the composition of the jury; (5) defendant's prima facie showing that all Negroes were eliminated by the solicitor was not sufficient to establish a prima facie case of arbitrary and systematic exclusion of Negroes and defendant failed to carry burden of showing arbitrary and systematic exclusion; (6) refusal of trial court to grant defendant's motion to excuse for cause a juror who expressed the view that defendant's inter-racial marriage could adversely affect her deliberations would not be considered error where court told defendant's counsel he could further examine juror, counsel chose not to do so and excused her peremptorily and did not request an additional peremptory challenge; (7) if a prospective juror states that under no circumstances could he vote for a verdict that would result in imposition of death penalty no matter how aggravated the case and regardless of the evidence shown, juror can properly be dismissed upon a challenge for cause; (8) prospective jurors who stated that they would not be willing to return a verdict in a rape case pursuant to which defendant could be lawfully executed, whatever the evidence might be, were properly excused for cause; (9) refusal to excuse for cause a juror who in certain questioning appeared to indicate an unwillingness to return a verdict of not guilty after hearing the evidence even if he had reasonable doubt about defendant's guilt, but who stated, in reply to further questioning by the court that he would not hesitate to return a verdict of not guilty if he had a reasonable doubt as to defendant's guilt was not an abuse of discretion; (10) where prosecuting witness testified at trial as to some of certain alleged homosexual episodes, and upon objection court properly allowed motion to strike and instructed jury not to consider what witness had been told, such instruction was sufficient and trial court would not be considered to have committed prejudicial error by not further instructing the jury to disregard the testimony; and (11) court's instructions to jury to not consider statement of a witness as to normal procedure in any normal rape case were sufficient to call attention of jurors to fact that statement should not be taken as evidence, and court would not be considered to have erred even though it did not fur-

Affirmed.

Higgins, J., dissented as to death sentence in an opinion.

1. Criminal Law ⇐1158(3)

Trial judge's rulings on questions as to competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. G.S. § 9-14.

2. Jury ⇐107

Three prospective jurors who stated unequivocally that they could not find defendant guilty even though State convinced them beyond a reasonable doubt of his guilt were not impartial jurors and were properly excused for cause.

3. Jury ⇐33(1)

Although a defendant has the right to be tried by jury from which members of his own race have not been systematically and arbitrarily excluded, a defendant does not have a right to be tried by a jury containing members of his own race or even to have a representative of his own race serve on the jury.

4. Jury ⇐129

Burden is upon defendant challenging racial composition of jury to establish racial discrimination in the composition of the jury.

5. Jury ⇐33(1)

Defendant's prima facie showing that all Negroes were eliminated by the solicitor was not sufficient to establish a prima facie case of arbitrary and systematic exclusion of Negroes and defendant failed to carry burden of showing arbitrary and systematic exclusion.

6. Jury ⇐110(14)

Refusal of trial court to grant defendant's motion to excuse for cause a juror who expressed the view that defendant's inter-racial marriage could adversely affect her deliberations would not be considered error where court told defendant's counsel he could further examine juror, counsel chose not to do so and excused her peremptorily and did not request an additional peremptory challenge.

7. Jury ⇐108

If a prospective juror states that under no circumstances could he vote for a verdict that would result in imposition of death penalty no matter how aggravated the case and regardless of the evidence shown, juror can properly be dismissed upon a challenge for cause.

8. Jury ⇐108

Prospective jurors who stated that they would not be willing to return a verdict in a rape case pursuant to which defendant could be lawfully executed, whatever the evidence might be, were properly excused for cause.

9. Jury ⇐107

Refusal to excuse for cause a juror who in certain questioning appeared to indicate an unwillingness to return a verdict of not guilty after hearing the evidence even if he had reasonable doubt about defendant's guilt, but who stated, in reply to further questioning by the court that he would not hesitate to return a verdict of not guilty if he had a reasonable doubt as to defendant's guilt was not an abuse of discretion.

11. Criminal Law ⇐1169.5(3)

Where prosecuting witness testified at trial as to some of certain alleged homosexual episodes, and upon objection court properly allowed motion to strike and instructed jury not to consider what witness had been told, such instruction was sufficient and trial court would not be considered to have committed prejudicial error by not further instructing the jury to disregard the testimony.

12. Criminal Law ⇐674

Court's instructions to jury to not consider statement of a witness as to normal procedure in any normal rape case were sufficient to call attention of jurors to fact that statement should not be taken as evidence, and court would not be considered to have erred even though it did not fur-

APPENDIX B

Outlawry Proclamation, State of North Carolina v. Henry N. Jarrette, Union County Superior Court No. 73-5-162 (Feb. 14, 1973).

93-5-162

93-5-162

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

COUNTY OF UNION — SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA

VS. — OUTLAWRY PROCLAMATION

HENRY N. JARRETTE

This cause came on to be heard upon written affidavit filed and retained by the undersigned Judge Presiding, and the undersigned Judge finds as a fact that HENRY N. JARRETTE is a fugitive from justice and is charged with the crimes of Murder and Rape, and that the said HENRY N. JARRETTE now flees from justice, conceals himself and avoids arrest and the service of the usual process of law in Union County and that the said HENRY N. JARRETTE now conceals himself in Union County or surrounding counties.

Now, therefore, it is ORDERED that the said HENRY N. JARRETTE forthwith surrender himself to the Sheriff of Union County or to any other lawful officer in said County; and, if the said HENRY N. JARRETTE does not forthwith surrender himself to the said Sheriff or the said law enforcement officers, then the said Sheriff is authorized to take such steps as he shall deem fit and necessary to go in search of and to apprehend the said HENRY N. JARRETTE, a fugitive from justice; and

IT IS FURTHER ORDERED that if the said fugitive, HENRY N. JARRETTE, continues to conceal himself and does not immediately surrender himself as herein directed, any citizen of this State may capture, arrest and bring the said fugitive to justice; and, in case the said fugitive attempts to flee or to resist capture when called on to surrender, any citizen may slay him, the said HENRY N. JARRETTE, without accusation or impeachment for any crime.

And, it appears further to the undersigned that the description of the said fugitive is as follows:

NAME: HENRY N. JARRETTE — HEIGHT: 5 Ft. 11 Inches

RACE: NEGRO — WEIGHT: 150 lbs.

SEX: MALE

Gold Tooth with star on same; scar on upper lip; 10 inch scar on back

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And, it is further ORDERED that a copy of this Proclamation be published at the door of the Union County Courthouse; Mecklenburg County Courthouse and three public places in Union and Mecklenburg Counties.

This 14 day of February, 1973.

John D. McConnell,
Judge Presiding

UNION County

Office of the Clerk of the Superior Court

I, Willie S. Simpson, Assistant, Clerk of the Superior Court of Union County, State of North Carolina, said Court being a Court of Record, having an official seal, which is hereto affixed, do hereby certify the foregoing and attached (two (2) sheets) to be a true copy of the OUTLAWRY PROCLAMATION in the matter of the State of North Carolina VS. HENRY N. JARRETTE

as the same is taken from and compared with the original now on file in this office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the Superior Court of Union County, at my office in Monroe, North Carolina, this 5 day of June, 19 74.

Willie S. Simpson
Asst. Clerk Superior Court
Ex Officio Judge of Probate

SEAL